TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1928

No. 568

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, APPELLANT,

vs.

ALABAMA PUBLIC SERVICE COMMISSION, HUGH WHITE, H. F. LEE, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA

FILED DECEMBER 5, 1928

(33,877)

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IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DIVISION OF THE MIDDLE DISTRICT OF ALABAMA

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation, Complainant,

vs.

ALABAMA PUBLIC SERVICE COMMISSION, HUGH WHITE, H. F. LEE, Frank P. Morgan, Charlie C. McCall, Attorney General of the State of Alabama, and J. Q. Smith, Special Assistant Attorney General of Alabama, Defendants.

BILL OF COMPLAINT—Filed June 28, 1928

To the Honorable Henry D. Clayton, Judge of the District Court of the United States for the Northern Division of the Middle District of Alabama:

The bill of complaint of St. Louis-San Francisco Railway Company respectfullly shows unto Your Honor as follows:

First. The complainant St. Louis-San Francisco Railway Company is a corporation organized and existing under and by virtue of the laws of the State of Missouri, having its principal office and place of business in St. Louis in said State, and as such a citizen and resident of the State of Missouri within the meaning of the acts of congress relating to diversity of citizenship. The defendant Alabama Public Service Commission is a body created by the laws of the State of Alabama, having general jurisdiction and supervision as a commission over the rates, facilities, [fol. 3] charges and practices of common carriers by railroad in the State of Alabama doing an intrastate business within such State. The defendants Hugh White, H. F. Lee and Frank P. Morgan are the individuals composing the membership of the said Alabama Public Service Commission, and each of said persons is a duly elected or appointed, qualified and acting member of the said Alabama Public Service Commission. The said Commission has its offices and headquarters at Montgomery, the capital of the State

of Alabama, and the said Hugh White, H. F. Lee and Frank P. Morgan are citizens and residents of the State of Alabama and of the Northern Division of the Middle District of Alabama, within the meaning of the acts of congress relating to diversity of citizenship. The defendant Charlie C. McCall is the duly elected, qualified and acting Attorney General of the State of Alabama, and as such is charged with the supervision and conduct of the enforcement of the laws of the said State in the courts thereof, and in his capacity as such Attorney General is the duly constituted legal adviser of the Alabama Public Service Commission, and is a citizen and resident of the State of Alabama and of the Northern Division of the Middle District of Alabama. The defendant J. Q. Smith is a duly appointed and acting Special Assistant Attorney General of the State of Alabama, is charged especially under his said appointment with the enforcement of the laws of Alabama having connection or relation with the rights, duties and obligations of the Alabama Public Service Commission and the enforcement of the orders and instructions of said Commission, and is a citizen and resident of said State and of the City of Birmingham in the Southern Division of the Northern District of Alabama.

Second. The amount in controversy in this suit exceeds, exclusive of interest and costs, the sum of three thousand dollars ($3,000), and this is a suit wholly between citizens [fol. 4] of different states within the meaning of the acts of congress relating to diversity of citizenship and to the jurisdiction of the courts of the United States.

Third. Complainant is a common carrier of freight and passengers by railroad operating an extensive system comprising approximately five thousand (5,000) miles of railroad lines within and through the States of Oklahoma, Arkansas, Kansas, Missouri, Tennessee, Mississippi and Alabama. Among other lines operated by complainant is one between Birmingham, Alabama, and Memphis, Tennessee, and along or upon said line is the town or city of Amory in the State of Mississippi, and among other places or stations upon its line within the State of Alabama, running from west to east are the towns and stations of Sulligent, Crews, Beaverton, Guin, Winfield, Glen Allen, Bazemore,

Eldridge, Clark and Carbon Hill. The distance between Sulligent, the most westerly Alabama station on complainant's line, and Carbon Hill is thirty-nine and nine-tenths (39.9) miles. Prior to the 18th day of June, 1928, the complainant operated passenger trains between Birmingham, the eastern terminal point of complainant's line in Alabama, and Amory, Mississippi, and other points west, four trains each day eastbound and a similar number each day westbound. The eastbound trains were known by the numbers of 105, 107, 921 and 925. The westbound trains were known as 106, 108, 922 and 926. The scheduled stops of these respective trains between Sulligent and Carbon Hill were as follows:

Eastbound

Station	Train No. 105	Train No. 107	Train No. 921	Train No. 925
Sulligent	.....	2:00 A. M.	12:38 P. M.	5:23 A. M.
Crews	.....	.....	12:45 "	5:31 "
Beaverton	.....	.....	12:51 "	5:37 "
Guin	.....	.....	1:02 "	5:48 "
Winfield	.....	2:45 A. M.	1:17 "	6:05 "
Glen Allen	.....	.....	1:25 "	6:14 "
Bazemore	.....	.....	1:30 "	6:19 "
Eldridge	.....	.....	1:42 "	6:30 "
Clark	.....	.....	1:46 "	6:34 "
Carbon Hill	1:16 P. M.	3:25 A. M.	1:56 "	6:44 "

[fol. 5]

Westbound

Station	Train No. 922	Train No. 926	Train No. 108	Train No. 106
Carbon Hill	10:55 A. M.	6:50 P. M.	1:35 A. M.	2:25 P. M.
Clark	11:00 "	7:04 "	.....	.....
Eldridge	11:05 "	7:09 "	.....	.....
Bazemore	11:15 "	7:20 "	.....	.....
Glen Allen	11:20 "	7:26 "	.....	.....
Winfield	11:30 "	7:38 "	2:12 "	.....
Guin	11:43 "	7:48 "	2:28 "	.....
Beaverton	11:53 "	7:58 "	.....	.....
Crews	11:59 "	8:05 "	.....	.....
Sulligent	12:14 P. M.	8:14 "	2:48 "	.....

Fourth. On June 18, 1928, complainant discontinued the operation of trains numbers 925 and 926 between Carbon Hill, Alabama, and Amory, Mississippi, but continued their operation between Carbon Hill and Birmingham, so that the local service previously afforded by those trains was eliminated only as to the Alabama stations of Sulligent, Crews, Beaverton, Guin, Winfield, Glen Allen, Bazemore, Eldridge and Clark, and through a distance of less than forty (40) miles.

Although complainant is unable to state with accuracy the present population of the abovenamed towns and of Carbon Hill, the 1920 Federal census gives population figures as follows:

Sulligent	1,071	Glen Allen	109
Crews	163	Bazemore	100
Beaverton	165	Eldridge	125
Guin	596	Clark	None
Winfield	753	Carbon Hill	3,000

Complainant says, however, that it is informed, and upon such information and belief avers, that the only one of the foregoing towns which has acquired anything more than a nominal increase of population since the year 1920 is the town of Carbon Hill, which has grown to some extent, whereas the population of the other towns has remained stationary or practically so.

Exclusive of trains 925 and 926, there still remain for the larger stations among those listed above the following trains in operation giving local service:

Sulligent has two trains each way a day, consisting of [fol. 6] eastbound trains 107 and 921 and westbound trains 922 and 108. All the four trains each day, both eastbound and westbound, stop at Carbon Hill. Guin has two trains westbound consisting of numbers 922 and 108, and one eastbound consisting of train number 921. Winfield has two trains each way each day, exclusive of numbers 925 and 926, consisting of eastbound trains 107 and 921, and westbound trains 922 and 108, the scheduled stops of all of such trains being shown in the tables above.

The ticket sales for these stations for the month of May, divided between intrastate and interstate sales, were as follows:

Station	State	Interstate
Sulligent	$97 00	$441 36
Crews	3 54	(Nothing)
Beaverton	2 15	5 85
Guin	296 71	151 51
Winfield	428 07	289 76
Glen Allen	11 26	(Nothing)
Bazemore	16 07	10 55
Eldridge	38 05	5.60

However, the foregoing figures for Winfield and Sulligent, both as to intrastate and interstate receipts, include also the ticket sales for trains numbers 921 and 922 and 107 and 108. A typical week of the earnings of trains numbers 925 and 926 between Amory, the terminus of those trains, and Carbon Hill, for April 15th-24th, inclusive, 1928, showed that train number 925 earned a gross revenue of 15 cents per mile per day, while train number 926 earned a gross revenue of 24 cents per mile per day; while the operating cost of each of those trains between the same points equaled or exceeded $1.00 per mile per day, or an operating loss of approximately 85 cents per mile per day. The reason for the discontinuance of trains numbers 925 and 926 between Carbon Hill and Amory is that between those points these trains were operated at the substantial loss shown above because of the fact that the passenger traffic between those points, as compared to the traffic between Car- [fol. 7] bon Hill and Birmingham, between which two points the said trains 925 and 926 still operate, and the consequent revenue is much heavier.

The cash fares for these stations for the month of May, divided between intrastate and interstate sales, were as follows:

Station	State	Interstate
Sulligent	$13 20	$6 16
Crews	6 45	4 79
Beaverton	7 83	63
Guin	50 55	59 32
Winfield	15 22	
Glen Allen	5 02	5 20
Bazemore	19 69	1 88
Eldridge	29 52	2 08
Carbon Hill	16 57	2 30

Complainant avers that trains numbers 925 and 926 have been consistently operated at a loss for a period of four or five years, due primarily to the heavy increase in the use of the automobile by persons formerly using train service over distances of from five to one hundred or one hundred and twenty-five or fifty miles; and it is further a fact that trains numbers 921 and 922, which are still

giving service to the stations between Carbon Hill and Sulligent and between Sulligent and Amory, and which are day-time trains, are operating at a loss in the territory between Sulligent and Carbon Hill.

Fifth. Complainant further avers that as is shown by the facts above averred, and having regard to the population of the territory in which the stations of Sulligent, Crews, Beaverton, Guin, Winfield, Glen Allen, Bazemore, Eldridge and Clark are located, the train service afforded those stations, exclusive of the discontinued trains numbers 925 and 926, is wholly adequate. These Alabama stations are located in the following counties: Bazemore and Glen Allen in Fayette County; Winfield and Guin in Marion County; Beaverton, Crews and Sulligent in Lamar County; and Clark and Eldridge in Walker County. Fayette [fol. 8] County has an estimated population of approximately 20,000, Walker of 60,000, Lamar of 20,000, and Marion of 25,000. Furthermore, as to those stations which do not have the service of two trains each way a day, they are easily accessible to the larger stations of Winfield, Carbon Hill and Guin, where additional trains each way stop.

Sixth. The defendant Alabama Public Service Commission and the defendants named herein composing the said Commission have demanded of complainant that it immediately reinstate or put back into service between Carbon Hill and Amory, Mississippi, the said trains 925 and 926.

The said defendants have not, however, issued or caused to be issued, to or against complainant any order or citation requiring it to appear before the Alabama Public Service Commission and show cause why the said Commission should not enter an order requiring the complainant to reinstate the said trains 925 and 926 or to furnish to the said stations between Carbon Hill and the western line of the State a service equivalent to that previously afforded by the said trains 925 and 926, and have not offered or afforded to complainant any legal hearing to determine whether the service afforded by complainant to the points hereinabove listed between and inclusive of Sulligent and Carbon Hill, without service from trains 925 and 926, is adequate or not, but have arbitrarily demanded,

as hereinabove averred, that the complainant reinstate said trains, and have accompanied their demands for such reinstatement with threats to proceed in the courts of Alabama against complainant to collect the heavy penalties hereinafter referred to.

The defendants rely, in making their said demand, upon Section 9713 of the Code of Alabama of 1923, which provides interalia that:

"No transportation company subject to this article shall abandon all or any portion of its service to the public or the portion of any of its lines, properties or plant which [fol. 9] would affect the service it is rendering the public, except ordinary discontinuance of service for non-payment of charges, non-uses, violations of rules and regulations or similar reasons in the course of business, unless and until, there shall first have been obtained from the Commission a permit allowing such abandonment,"

and upon Section 9730 of the Code of Alabama, which provides as follows:

"Any transportation company which wilfully fails to comply with any of the provisions of this article or which abandons any service without first obtaining the consent of the Commission, or wilfully fails to obey, observe or comply with any lawful order, decision, rule, regulation, direction or requirement, or any part or provision thereof of the Commission, shall forfeit to the State of Alabama not over one thousand dollars for each offense, the amount to be fixed by the courts and to be recovered in a civil suit by the State instituted in the Circuit Court of Montgomery County, Alabama,"

and also the said defendants rely upon Section 9731 of the said Code, which provides inter alia as follows:

"Every violation of the provisions of this article, or of any order, decision, regulation, direction or requirement of the Commission or any part or portion thereof by any transportation company, is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense."

Furthermore, Section 5350 of the Code of Alabama provides in substance that every officer, agent or employee of any common carrier or railroad corporation who shall violate or procure, aid or abet any violation by such common carrier or railroad corporation, of any of the statutes of the State of Alabama relating to adequate service, or who shall fail to obey, observe or comply with any order of the Public Service Commission, or who procures, aids or abets any common carrier or corporation in its failure to obey, observe and comply with any order, direction or provision relating to adequate service shall be guilty of a misdemeanor and on conviction thereof shall be fined not exceeding one thousand dollars, to be fixed by the court; and Section 5399 of the said Code provides in substance that every officer, agent or employee of any common carrier or corporation who shall violate or who procures, aids or abets any violation of, or who shall fail to obey, observe or [fol. 10] comply with any order of the Public Service Commission, shall be guilty of a misdemeanor and upon conviction shall be fined a sum not exceeding five hundred dollars for each offense, to be fixed by the court or the judge trying the case.

Seventh. The laws of the State of Alabama furnish no method or procedure by which this complainant can in advance test the legality of the directions and requirements by the defendants that it reinstate said trains 925 and 926 or the validity of Sections 9713 and 9730 of the Code of Alabama hereinbefore referred to, and complainant is now confronted with the necessity either of obeying the demands and directions of the said defendants, the Alabama Public Service Commission and the members thereof, or of subjecting complainant to repeated and innumerable suits and prosecutions in the courts of Alabama for the fines and penalties provided by the said Alabama statutes hereinabove quoted, and of laying its officers and employees open to criminal prosecutions under Sections 5350 and 5399 of the Alabama Code

Eighth. And complainant avers that Sections 9713 and 9730 of the Code of Alabama hereinabove set forth, if construed as requiring this complainant first to obtain the consent of the Alabama Public Service Commission before

discontinuing the said trains 925 and 926 west of Carbon Hill, and as subjecting this complainant to the imposition of the enormous fines and penalties, and complainant's officers to prosecutions as provided by the Alabama statutes in the event of complainant's refusal to reinstate its said trains 925 and 926 in service west of Carbon Hill, are unconstitutional and void as in contravention of Article 3, of Section 8 of, and of the 14th amendment to, the Constitution of the United States, in that they seek to, and do, impose an unreasonable burden upon, and regulation of, interstate commerce, and seek to, and their necessary effect [fol. 11] is to, deprive this complainant of its property without due process of law, in this: that Sections 9713 and 9730 of the said Code of Alabama construed by the defendants as requiring this complainant to first obtain the consent of the defendant Alabama Public Service Commission to a discontinuance of the said service formerly afforded by the said trains 925 and 926, and providing enormous penalties against complainant and for criminal prosecution of its officers, are (in view of the adequacy of the transportation service accorded by complainant to the said localities and stations between and inclusive of Carbon Hill and Sulligent hereinbefore named, by the other trains) a direct, unreasonable and burdensome regulation of interstate commerce in violation of Article 3 of Section 8 of the Constitution of the United States.

Said sections, as so construed by said Commission, are, moreover, in violation of said commerce clause of the Federal Constitution in that they seek to regulate and impose burdens upon interstate commerce by prohibiting the discontinuance of a service rendered by a common carrier in interstate commerce, without the consent of the said Alabama Public Service Commission, and thereby seek to invade a field of regulation over which the State of Alabama possesses no jurisdiction or control.

That said Section 9730 penalizes the discontinuance of the said service afforded by the said trains 925 and 926, without complainant being accorded an opportunity or method under the Alabama laws to first contest the legality of the said statute in the courts, as imposing a burden upon and regulation of interstate commerce, before being sub-

jected to enormous fines and penalties and laying complainant's officers, agents and employees open to criminal prosecutions; and the effect of said section is to require complainant to elect at its peril between an obedience to the said statute (if properly construed as requiring the complainant in the present instance to first obtain the consent of the [fol. 12] Alabama Public Service Commission to a discontinuance of the service afforded by the said trains 925 and 926), and, in the alternative, the subjection to and payment of such fines and penalties and to criminal prosecutions if such statutes should be held to be not in violation of the commerce clause of the Constitution, as an unlawful attempt to regulate or burden interstate commerce or should be held not to deprive the complainant of its property without due process of law in violation of the 14th Amendment to the said Constitution.

Complainant, while denying that the said Section 9730 contains any valid requirement that complainant should first obtain the consent of the defendant Commission, as so construed by the said defendants, avers that as so construed it is further void as attempting to deprive this complainant of its property without due process of law, if a common carrier abandons any service without first obtaining the consent of the commission, without reference to whether the said service is interstate or intrastate, and without reference to whether or not the said Public Service Commission has any jurisdiction of or control over the carrier with reference to such service, or of the trains 925 and 926, in that it provides enormous and confiscatory penalties for the refusal on the part of a common carrier to obey any rule, regulation, direction or requirement of the Commission without regard to whether said Commission has afforded the carrier an opportunity to resist or contest or be heard upon the reasonableness or validity of any such rule, regulation, direction or requirement promulgated by said Commission, and without reference to the regularity or legality of any such direction or requirement.

Ninth. Complainant avers that it has no adequate way of testing the constitutionality of the said Alabama statutes save in this honorable court, since if complainant had [fol. 13] applied to the Alabama Public Service Commis-

sion for permission to discontinue the said trains 925 and 926, it would have, in effect, recognized the jurisdiction of said Commission in the premises, which complainant denies; and since said Commission has never issued any citation or order to this complainant requiring it to appear before it, or entered any formal order against complainant with reference to the operation of said trains 925 and 926, no action has been taken by said Commission that will lay any predicate, or form any basis, for any appellate review in the Alabama courts.

And complainant further avers that said Commission is threatening to, and will, unless enjoined and restrained by this honorable court, immediately proceed against complainant in the court of Alabama in an effort to recover in one or more suits or actions the enormous and cumulative fines and penalties provided by the Alabama statutes; and so long as complainant fails to reinstate the service of said trains 925 and 926, complainant will be, at the election of the said defendants, subject to separate actions or suits to recover separate and cumulative penalties during each day that the failure of complainant may continue.

Complainant avers that by reason of the premises and of the threatened action on the part of the said Alabama Commission and its attorneys, irreparable damage to complainant is imminent; that it has no adequate remedy at law, and that it is necessary that a decree be entered in this court forever restraining and enjoining the defendants from commencing any actions against complainant as for any of the matters or things or asserted violations by complainant of the Alabama statutes referred to.

Complainant further avers that in order to prevent the institution by, or at the instance of, the defendants of the actions and suits to recover the penalty or penalties hereinbefore mentioned and threatened by defendants, it is nec- [fol. 14] essary that pending the hearing upon the application of complainant for an interlocutory injunction as hereinafter prayed for, Your Honor will enter a temporary order or decree restraining the defendants from proceeding against complainant, as they have threatened to do, in the courts of Alabama, pending the hearing on the application for an interlocutory injunction pending the final hearing herein.

The premises considered, complainant prays that defendants be required by appropriate process to appear herein and plead to or answer this bill within the time required by law and the rules and practice of this court; that Your Honor will enter the appropriate order providing that this cause proceed to a hearing in accordance with the provisions of Section 266 of the Federal Judicial Code (36 Stat. L. 1162 as amended by 37 Stat. L. 1013), and that complainant's application for an interlocutory injunction as hereinafter prayed be set down for hearing upon some date, allowing at least five days notice thereof to the Governor and to the Attorney General of the State of Alabama, and to the other defendants herein. That upon such hearing the Court will enter a decree temporarily and until the final hearing in this cause restraining and enjoining the defendants and each of them, and their officers, agents or employees, from commencing or attempting to commence, in the courts of Alabama, any actions, suits or proceedings of any nature whatsoever to recover of or from complainant any of the penalties provided in Sections 9713 and 9730 of the Code of Alabama, for or because of the discontinuance by the complainant of the service of said trains 925 and 926, or for or because of a refusal or failure on the part of complainant to reinstate said service, or for or because of any failure or refusal of complainant to obey or comply with the demands, orders or directions of the defendants [fol. 15] or any of them that complainant reinstate said service; that complainant is now and has been since the 18th day of June, 1928, affording adequate train service without the service previously afforded by trains 925 and 926; that complainant was under no legal duty or obligation to first apply to the said Alabama Public Service Commission for its consent to such discontinuance, because the said trains 925 and 926 were trains operating in interstate commerce, over which the said Alabama Public Service Commission had no jurisdiction nor control; and that this Court will ascertain and declare, order, adjudge and decree that the said Sections 9713 and 9730 of the Code of Alabama, if construed as requiring the complainant to first obtain the consent of the Alabama Public Service Commission to a discontinuance of the service afforded by said trains 925 and 926, are each, separately and severally, in

contravention of the Constitution of the United States, as hereinbefore particularly averred.

And complainant further prays that upon the final hearing hereof, that the interlocutory injunction theretofore issued in this cause may be made final and perpetual, and that the defendants, their officers and agents, be forever restrained and enjoined from instituting or continuing any actions or suits for penalties in the courts of Alabama because of the discontinuance of the service of said trains 925 and 926, and from causing, or assisting, or procuring, the criminal prosecution of any of the officers or agents of this complainant for any violation of said Alabama statutes in the premises.

And complainant further prays that this Court will grant to the complainant such other, further or different relief as may be proper in the premises.

Cabiness, Johnston, Cocke & Cabiness, W. R. C. Cocke, Solicitors for Complainant.

[fol. 16] NOTE.—The defendants and each of them are hereby required to answer the foregoing bill of complaint and each and every paragraph thereof, but not under oath, answer thereto under oath being hereby expressly waived.

Cabiness, Johnston, Cocke & Cabiness, W. R. C. Cocke, Solicitors for Complainant.

Duly sworn to by J. R. McGregor. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO BILL OF COMPLAINT—Filed July 25, 1928

And now comes complainant and amends its bill of complaint in the following particulars:

(1) By changing the statement as to the ticket sales for the stations listed for the month of May, 1928 so that the same shall read as follows, and shall include the statement as to the cash fares from such stations:

Stations	Local traffic				Conductors' cash fares			
	Interstate		State		Interstate		State	
	Passengers	Revenue	Pass.	Rev.	Pass.	Rev.	Pass.	Rev.
Sulligent	115	$194 67	230	$499 37	6	$6 16	9	$13 20
Crews	1	64	4	2 90	6	4 78	10	6 45
Beaverton	4	5 85	23	21 55	1	63	17	7 83
Guin	38	76 05	188	280 36	25	59 32	39	50 55
Winfield	41	169 60	255	403 74			14	15 22
Glen Allen			40	11 26	2	5 20	13	5 02
Bazemore	3	10 55	26	16 07	1	1 88	39	19 69
Elkridge	3	5 60	63	58 05	1	2 08	49	29 52

Stations	Interline traffic: Interstate: Passengers	Interline traffic: Interstate: Revenue	Interline traffic: State: Pass.	Interline traffic: State: Rev.	Total: Interstate: Pass.	Total: Interstate: Rev.	Total: State: Pass.	Total: State: Rev.
Sulligent	15	$60 25	2	$4 88	136	$261 08	241	$517 45
Crews					7	5 42	14	9 35
Beaverton					5	6 48	40	29 38
Guin	4	14 71	2	9 48	67	150 08	229	340 39
Winfield	7	38 12	4	11 64	48	207 72	273	430 60
Glen Allen					2	5 20	53	16 28
Bazemore					4	12 43	65	35 76
Eldridge					4	7 68	112	87 57
Total						$656 09		$1.466 78
Interstate				$656 09				
State				1.466 78				
Total				$2,122 87				

[fols. 18-22] (2) By striking from Paragraph Eighth of the bill of the words "of Article 3 of Section 8 of," and by inserting in lieu thereof the following: "paragraph 3, of Section 8, of Article I."

W. R. C. Cocke, Cabiness, Johnson, Cocke & Cabiness, Solicitors for Complainant.

Duly sworn to by J. R. McGregor. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 23] In United States District Court

[Title omitted]

Affidavit of Jno. C. Starkey—Filed July 25, 1928

State of Missouri,
City of St. Louis, ss:

Jno. C. Starkey, being first duly sworn, upon his oath deposes and says:

That this affiant is a resident of the City of St. Louis, Missouri; that affiant is now and has been for a number of years last past, Auditor of Passenger Accounts of St. Louis-San Francisco Railway Company, complainant in the above entitled cause, and as such has direct charge of the records and books of account of said St. Louis San Francisco Railway Company showing the revenue derived by said St. Louis-San Francisco Railway Company from the transportation of passenger traffic on its trains, and is familiar with such records and books of account; that during the months of January, February March, April, May and June, 1928, the passenger revenue derived by said St. Louis-San Francisco Railway Company from the sale of tickets at the stations of Sulligent, Crews, Beaverton, Guin, Winfield, Glen Allen, Bazemore and Eldridge, Alabama, good for transportation on the trains of said St. Louis San Francisco Railway Company from said stations respectively to points in the State of Alabama and to points in other states on the lines of railroad of said St. Louis-San Francisco Rail-

[fol. 25]

January, 1928

Stations	Local traffic: Interstate Pagrs.	Local traffic: Interstate Rev.	Local traffic: State Pagrs.	Local traffic: State Rev.	Conductors' cash fares: Interstate Pagrs.	Conductors' cash fares: Interstate Rev.	Conductors' cash fares: State Pagrs.	Conductors' cash fares: State Rev.	Interline traffic: Interstate Pagrs.	Interline traffic: Interstate Rev.	Interline traffic: State Pagrs.	Interline traffic: State Rev.	Total: Interstate Pagrs.	Total: Interstate Rev.	Total: State Pagrs.	Total: State Rev.
Sulligent	225	$329 38	262	$646 41	10	$8 24	9	$4 40	13	$52 74			248	$390 36	271	$650 81
Crews	3	13 16	36	28 92	4	5 70	14	3 50					7	18 86	50	32 42
Beaverton	7	10 21	22	9 33	9	8 39	26	27 22					16	18 60	48	36 55
Guin	34	80 39	152	235 66	36	56 49	56	66 43	3	22 16			73	159 04	208	302 09
Winfield	49	197 14	369	571 05	2	2 72	22	19 25	9	77 98	6	$17 46	60	277 84	397	607 76
Glen Allen	1	2 16	25	8 77	1	77	15	11 84					2	2 93	40	20 61
Bazemore	8	19 94	34	16 95	1	1 88	38	16 61					9	21 82	72	33 56
Eldridge	3	10 22	50	32 37	3	2 72	79	55 16					6	12 94	129	87 53

Total ..... $902 39 ..... $1,771 33

Interstate $902 39
State 1,771 33

Total $2,673 72

[fol. 26]

February, 1928

Stations	Local traffic: Interstate Pagrs.	Local traffic: Interstate Rev.	Local traffic: State Pagrs.	Local traffic: State Rev.	Conductor's cash fares: Interstate Pagrs.	Conductor's cash fares: Interstate Rev.	Conductor's cash fares: State Pagrs.	Conductor's cash fares: State Rev.	Interline traffic: Interstate Pagrs.	Interline traffic: Interstate Rev.	Interline traffic: State Pagrs.	Interline traffic: State Rev.	Total: Interstate Pagrs.	Total: Interstate Rev.	Total: State Pagrs.	Total: State Rev.
Sulligent	164	$194 59	196	$350 28	6	$5 34	9	$5 59	7	$29 21			177	$229 14	205	$364 87
Crews	3	7 74	23	14 59	6	5 54	16	6 90					9	13 28	39	21 49
Beaverton	2	2 22	35	22 85	4	4 44	17	9 45					6	6 66	52	32 30
Guin	34	63 59	152	247 37	37	59 77	55	52 33					71	123 36	207	299 70
Winfield	43	131 31	264	414 22	3	5 59	34	25 62	10	45 83	2	$5 84	56	182 73	300	455 68
Glen Allen			43	40 79			21	13 71							64	54 50
Bazemore	2	4 15	17	18 89			50	22 50					2	4 15	67	41 39
Eldridge	2	3 96	39	19 83	2	4 16	58	31 80					4	8 12	97	51 63

Total ..... $567 44 ..... $1,311 56

Interstate $567 44
State 1,311 56

Total $1,879 00

[fol. 27]

March, 1928

Stations	Local traffic: Interstate Pagrs.	Local traffic: Interstate Rev.	Local traffic: State Pagrs.	Local traffic: State Rev.	Conductor's cash fares: Interstate Pagrs.	Conductor's cash fares: Interstate Rev.	Conductor's cash fares: State Pagrs.	Conductor's cash fares: State Rev.	Interline traffic: Interstate Pagrs.	Interline traffic: Interstate Rev.	Interline traffic: State Pagrs.	Interline traffic: State Rev.	Total: Interstate Pagrs.	Total: Interstate Rev.	Total: State Pagrs.	Total: State Rev.
Sulligent	164	$232 32	257	$557 72	12	$14 48	13	$13 93	10	$45 65	2	$7 30	186	$292 45	272	$578 95
Crews	4	2 80	18	23 30	1	1 96	12	8 00					5	4 76	30	32 10
Beaverton	5	5 74	34	31 27	3	3 29	9	11 94					8	9 03	43	43 21
Guin	41	88 64	180	294 61	37	63 65	33	33 45					78	152 29	213	328 06
Winfield	51	203 31	292	419 63	3	8 77	17	17 47	3	15 35	5	14 55	57	227 43	314	451 65
Glen Allen	1	1 77	37	17 40	3	3 42	10	6 28					4	5 19	47	23 68
Bazemore	2	6 54	49	21 29	1	1 88	29	13 03					3	6 42	88	34 32
Eldridge	1	1 74	62	32 87	2	4 16	58	30 38					3	5 90	120	63 25

Total ..... $703 47 ..... $1,555 22

Interstate $703 47
State 1,555 22

Total $2,258 69

[fol. 28]

April, 1928

Stations	Local traffic: Interstate Pagrs.	Local traffic: Interstate Rev.	Local traffic: State Pagrs.	Local traffic: State Rev.	Conductor's cash fares: Interstate Pagrs.	Conductor's cash fares: Interstate Rev.	Conductor's cash fares: State Pagrs.	Conductor's cash fares: State Rev.	Interline traffic: Interstate Pagrs.	Interline traffic: Interstate Rev.	Interline traffic: State Pagrs.	Interline traffic: State Rev.	Total: Interstate Pagrs.	Total: Interstate Rev.	Total: State Pagrs.	Total: State Rev.
Sulligent	150	$218 79	156	$333 78	11	$10 28	12	$13 97	3	$11 52	1	$3 65	164	$240 59	169	$351 40
Crews	3	2 46	9	3 53	1	98	19	15 36	....	....	....	....	4	3 44	28	18 89
Beaverton	3	3 20	20	14 78	2	1 88	11	13 68	....	....	....	....	5	5 08	31	28 46
Guin	36	68 97	209	316 47	33	52 47	37	27 63	1	3 46	....	....	70	124 90	246	344 10
Winfield	45	200 79	293	421 80	1	1 60	20	9 93	2	8 93	5	14 50	48	211 32	318	446 23
Glen Allen	....	....	39	10 84	....	....	23	30 00	....	....	....	....	....	....	62	40 84
Bazemore	2	3 76	24	10 14	....	....	57	28 04	....	....	....	....	2	3 76	81	38 18
Eldridge	2	3 92	54	41 87	....	....	65	35 86	....	....	....	....	2	3 92	119	77 73

Total ..... $593 01 ..... $1,345 83

Interstate $593 01
State 1,345 83

Total $1,938 84

[fol. 29]

May, 1928

Stations	Local traffic: Interstate Pagrs.	Local traffic: Interstate Rev.	Local traffic: State Pagrs.	Local traffic: State Rev.	Conductor's cash fares: Interstate Pagrs.	Conductor's cash fares: Interstate Rev.	Conductor's cash fares: State Pagrs.	Conductor's cash fares: State Rev.	Interline traffic: Interstate Pagrs.	Interline traffic: Interstate Rev.	Interline traffic: State Pagrs.	Interline traffic: State Rev.	Total: Interstate Pagrs.	Total: Interstate Rev.	Total: State Pagrs.	Total: State Rev.

Total $2,258.69

[fol. 28]

April, 1928

Stations	Local traffic: Interstate Pagrs.	Rev.	State Pagrs.	Rev.	Conductor's cash fares: Interstate Pagrs.	Rev.	State Pagrs.	Rev.	Interline traffic: Interstate Pagrs.	Rev.	State Pagrs.	Rev.	Total: Interstate Pagrs.	Rev.	State Pagrs.	Rev.
Sulligent	150	$218.79	156	$333.78	11	$10.28	12	$13.97	3	$11.52	1	$3.65	164	$240.59	169	$351.40
Crews	3	2.46	9	3.53	1	.98	19	15.36	....	.....	....	.....	4	3.44	28	18.89
Beaverton	3	3.20	20	14.78	2	1.88	11	13.68	....	.....	....	.....	5	5.08	31	28.46
Guin	36	68.97	209	316.47	33	52.47	37	27.63	1	3.46	....	.....	70	124.90	246	344.10
Winfield	45	200.79	293	421.80	1	1.60	20	9.93	2	8.93	5	14.50	48	211.32	318	446.23
Glen Allen	....	.....	39	10.84	....	.....	23	30.00	....	.....	....	.....	....	.....	62	40.84
Bazemore	2	3.76	24	10.14	....	.....	57	28.04	....	.....	....	.....	2	3.76	81	38.18
Eldridge	2	3.92	54	41.87	....	.....	65	35.86	....	.....	....	.....	2	3.92	119	77.73
Total														$593.01		$1,345.83

Interstate	$593.01
State	1,345.83
Total	$1,938.84

[fol. 29]

May, 1928

Stations	Local traffic: Interstate Pagrs.	Rev.	State Pagrs.	Rev.	Conductor's cash fares: Interstate Pagrs.	Rev.	State Pagrs.	Rev.	Interline traffic: Interstate Pagrs.	Rev.	State Pagrs.	Rev.	Total: Interstate Pagrs.	Rev.	State Pagrs.	Rev.
Sulligent	115	$194.67	230	$499.37	6	$6.16	9	$13.20	15	$60.25	2	$4.88	136	$261.08	241	$517.45
Crews	1	.64	4	2.90	6	4.78	10	6.45	....	.....	....	.....	7	5.42	14	9.35
Beaverton	4	5.85	23	21.55	1	.63	17	7.83	....	.....	....	.....	5	6.48	40	29.38
Guin	38	76.05	188	280.36	25	50.32	39	50.55	4	14.71	2	9.48	67	150.08	229	340.39
Winfield	41	169.60	255	403.74	....	.....	14	15.22	7	38.12	4	11.64	48	207.72	273	430.60
Glen Allen	....	.....	40	11.26	2	5.20	13	5.02	....	.....	....	.....	2	5.20	53	16.28
Bazemore	3	10.55	26	16.07	1	1.88	39	19.69	....	.....	....	.....	4	12.43	65	35.76
Eldridge	3	5.60	63	58.05	1	2.08	49	29.52	....	.....	....	.....	4	7.68	112	87.57
Total														$656.09		$1,466.78

Interstate	$656.09
State	1,466.78
Total	$2,122.87

[fol. 30]

June, 1928

Stations	Local traffic: Interstate Pagrs.	Rev.	State Pagrs.	Rev.	Conductor's cash fares: Interstate Pagrs.	Rev.	State Pagrs.	Rev.	Interline traffic: Interstate Pagrs.	Rev.	State Pagrs.	Rev.	Total: Interstate Pagrs.	Rev.	State Pagrs.	Rev.
Sulligent	105	$162.62	205	$449.59	5	$9.31	13	$15.92	3	$14.46	5	$21.91	113	$186.39	223	$487.42
Crews	....	.....	10	15.94	1	.98	7	6.59	....	.....	....	.....	1	.98	17	22.53
Beaverton	3	1.41	21	27.19	4	8.54	8	3.05	....	.....	....	.....	7	9.95	29	30.24
Guin	26	51.32	197	259.38	15	28.02	27	32.97	1	5.97	2	7.91	42	85.31	226	300.26
Winfield	42	186.10	266	520.28	....	.....	13	11.49	6	25.39	8	24.74	48	211.49	317	556.51
Glen Allen	1	1.77	36	20.18	1	1.60	10	6.02	....	.....	....	.....	2	3.37	46	26.20
Bazemore	....	.....	23	20.31	....	.....	30	9.97	....	.....	....	.....	....	.....	53	30.28
Eldridge	1	1.66	34	23.87	....	.....	24	15.76	....	.....	....	.....	1	1.66	58	39.63
Total														$499.15		$1,493.07

Interstate	$499.15
State	1,493.07
Total	$1,992.22

[fol. 31]

Recapitulation

January, 1928:		
Interstate	$902.39	
State	1,771.33	
		$2,673.72
February, 1928:		
Interstate	$547.44	
State	1,331.56	
		$1,879.00
March, 1928:		
Interstate	$703.47	
State	1,555.22	
		$2,258.69
April, 1928:		
Interstate	$593.01	
State	1,345.83	
		$1,938.84
May, 1928:		
Interstate	$656.09	
State	1,466.78	
		$2,122.87
June, 1928:		
Interstate	$499.15	
State	1,493.07	
		$1,992.22
Grand total		$12,865.34

way Company, from said St. Louis-San Francisco Railway Company's proportion of the revenue from the sale at said stations respectively of interline tickets, i. e. tickets good for transportation over the line of railway of said Railway Company and over the lines of connecting carriers to destinations on the lines of such connecting carriers, and from [fol. 24] cash fares collected from passengers boarding the trains of said St. Louis-San Francisco Railway Company at said stations hereinabove named, was as hereinafter set forth;

(Here follow tables marked side folio pages 25, 26, 27, 28, 29, 30, and 31)

[fol. 32] Affiant further states that the statements above set forth are true and correct statements of the revenue derived by said St. Louis-San Francisco Railway Company during the first six months of the calendar year 1928 from passenger traffic at the stations above named, as shown by the records and books of account of said St. Louis-San Francisco Railway Company under the charge of this affiant. Affiant further states that it is impossible at this time to ascertain and determine whether the tickets so sold at said stations above mentioned were honored for passage, or whether the passengers transported thereon were transported, on any particular train operated by said St. Louis-San Francisco Railway Company on its line of railroad passing through said stations.

Further affiant saith not.

Jno. C. Starkey.

Subscribed and sworn to before me on this the 19th day of July, 1928. My commission expires November 13, 1928. Walter Studt, Notary Public within and for the City of St. Louis, State of Missouri. (Seal.)

[File endorsement omitted.]

[fol. 33] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF A. P. MATTHEWS—Filed July 25, 1928

STATE OF ALABAMA,
Jefferson County:

Before me, the undersigned authority, a Notary Public in and for the State and County aforesaid, on this the 20th day of July, 1928, personally appeared A. P. Matthews, who, being by me first duly sworn, on oath deposes and says:

I occupy the position of Assistant General Passenger Agent with St. Louis-San Francisco Railway Company, and in this and similar positions with that company during the last ten years, I am familiar with the operation of the passenger trains on the railway system of St. Louis San Francisco Railway Company (hereinafter referred to as the Company), including all passenger trains operated over the line of railway between Amory, Mississippi and Birmingham, Alabama, which were the respective termini of trains 925 and 926 prior to the discontinuance of their operation on June 18, 1928.

The distance between the Mississippi state line and Birmingham, on the line of railway of the Company, is approximately 186 miles. For a long time prior to the discontinuance of the operation of passenger trains 925 and 926 between Carbon Hill, Alabama and Amory, Mississippi, passenger traffic carried thereon had been continuously and progressively decreasing, due in part to the construction of improved highways and the consequent increase thereon of private automobiles and buses operated as passenger carriers.

At least three-forths of the passenger travel on interline tickets, that is, tickets sold to passengers travelling not alone on these trains, but also on the lines of connecting carriers, to and from the stations in Alabama west of Car-
[fol. 34] bon Hill, viz., Sulligent, Crews, Beaverton, Guin, Winfield, Glen Allen, Bazemore, and Eldridge, was, prior to the discontinuance of trains 925 and 926, on trains other than those trains, due partly to the fact that one of the termini was Amory, Mississippi, at which point as to these

trains there was no prompt connection with any other train or trains on the Company's line west of Amory. The railroad of St Louis-San Francisco Railway Company is the only one handling passenger traffic to and from the town of Amory. If it were not for the long distance passenger traffic carried on other trains of the Company numbered 105, 106, 107, 108, whose movements and schedules are set forth correctly in the bill of complaint, and are operated between Kansas City, Missouri and Birmingham, and on trains numbers 921 and 922, operated between Memphis and Birmingham, the operation of all six trains in Alabama would not be justified and such trains could not be operated except at great and excessive loss, for the reason that the local traffic in Alabama would be insufficient to support these trains.

With reference to the stations of Crews, Bazemore, Beaverton, Glen Allen, and Eldridge, for the eighteen days in the month of June prior to the discontinuance of trains 925 and 926, the total number of passengers handled on these trains was 203, or an average of 11 per day. While I have no exact figures as to the division of the above amount of earnings as between trains 925 and 926 on the one hand, and the other trains 921 and 922, I am certain that as much as two-thirds of this revenue was earned by trains 921 and 922, for the reason that both these trains are local daylight trains, whereas train 925 passed these stations in the early morning hours, and 926 passed the same stations in the opposite direction after 7 o'clock at night.

I have not mentioned in the foregoing the stations of Sulligent, Guin and Winfield, the other three stations affected by the discontinuance of trains 925 and 926, because all three of those stations are served westbound by train number 108, and Sulligent and Winfield are served eastbound by train 107, those two trains not serving the other stations of Crews, Beaverton, Glen Allen, Bazemore and Eldridge.

A. P. Matthews.

[fol. 35] Subscribed and sworn to before me this the 20th day of July, 1928. D. E. Wade, Notary Public, Jefferson County, Ala. (Seal.)

[File endorsement omitted.]

[fol. 36] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF H. W. PRESS—Filed July 25, 1928

STATE OF MISSOURI,
City of St. Louis, ss:

H. W. Press, being first duly sworn, upon his oath deposes and says: that this affiant is a resident of the City of St. Louis, Missouri; that affiant is now, and has been for a number of years last past, Assistant to Comptroller in Charge of Statistics, of St. Louis-San Francisco Railway Company, complainant in the above entitled cause, and as such is familiar with the records and accounts of said St. Louis-San Francisco Railway Company showing the cost of operation of passenger trains on the line of railroad of said Railway Company; that affiant has from time to time in the past several years made a study of the cost of operation of passenger trains Nos. 105, 106, 107 and 108 operated by said St. Louis-San Francisco Railway Company between Kansas City, Missouri, and Birmingham, Alabama, passenger trains Nos. 921 and 922 operated by said St. Louis-San Francisco Railway Company between Memphis, Tennessee, and Birmingham, Alabama, and passenger trains Nos. 925 and 926, which latter trains prior to June 18, 1928, were operated by said St. Louis-San Francisco Railway Company between Amory, Mississippi, and Birmingham, Alabama; that from such cost study affiant has ascertained and determined, and states the fact to be, that the direct operating cost incurred by said St. Louis-San Francisco Railway Company in the operation of said passenger trains Nos. 105, 106, 107, 108, 921, 922, 925 and 926 is approximately One ($1.00) Dollar per train mile; that such operating cost per train mile includes only cost items incurred in the direct operation of said trains, and does not include [fol. 37] overhead charges, cost of maintenance of way and structures, and similar cost items. Affiant further states that he has ascertained and determined, and states the fact to be, that said direct operating cost of approximately One Dollar ($1.00) per train mile is applicable to and represents the direct operating cost incurred by said St. Louis-San Francisco Railway Company in the operation of each of

said trains above mentioned between the state line between the states of Mississippi and Alabama and the City of Birmingham, Alabama. Affiant further states that such direct operating cost of One Dollar ($1.00) per train mile heretofore incurred by said St. Louis-San Francisco Railway Company in the operation of said trains above mentioned will be immediately increased by reason of an increase in wages recently awarded to the engine crews operating the locomotives hauling said trains.

Further affiant saith not.

(Signed) H. W. Press.

Subscribed and sworn to before me on this 16th day of July 1928. My commission expires November 13, 1928. Walter Studt, Notary Public within and for the City of St. Louis, State of Missouri. (Seal.)

[File endorsement omitted.]

[fol. 38] In United States District Court

[Title omitted]

Answer to Bill of Complaint—Filed July 25, 1928

And further answering plaintiff's bill of complaint, defendants say:

First. Defendants admit as true the allegations set out in paragraph one of the bill of complaint, with this exception, namely: The said Hugh White, named therein, has his legal residence in Gadsden, Etowah County, Alabama, and the said H. F. Lee, named in said first paragraph, has had legal residence in Clayton, Barbour County, Alabama. Both said Hugh White and said H. F. Lee reside temporarily in Montgomery, Alabama, while holding office as members of said Alabama Public Service Commission.

Second. Defendants admit as true the allegations set out in paragraph two of the bill of complaint, with this exception, namely: Defendants neither admit nor deny that the amount in controversy in this suit exceeds, exclusive of

interest and costs, the sum of three thousand ($3,000.00) dollars, and defendants demand strict proof thereof.

Third. The defendants deny that complainant's train No. 105 East bound serves Carbon Hill as a scheduled stop, and say that plaintiff's schedule showing the stops of its said train on file with the said Commission shows that said train No. 105 does not stop at Carbon Hill. Defendants admit all other allegations of paragraph three of the bill.

Fourth. Defendants admit as true that part of the allegation of paragraph four, which states that "on June 18, [fol. 39] 1928, complainant discontinued the operation of trains Numbers 925 and 926 between Carbon Hill, Alabama, and Amory, Mississippi," but deny each and every other allegation and part of said paragraph four, and demand a strict proof thereof.

Fifth. Defendants deny each and every allegation contained in paragraph five of the bill of complaint and demand strict proof thereof.

Sixth. Defendants deny that part of paragraph six of the bill of complaint which alleges "The Alabama Public Service Commission and other defendants named therein have demanded of complainant that it immediately reinstate or put back into service between Carbon Hill, Alabama, and Amory, Mississippi, the said trains 925 and 926."

Defendants admit that they have not issued or caused to be issued to, or against complainant any order or citation requiring it to appear before the Alabama Public Service Commission and show cause why said Commission should not enter an order requiring the complainant to reinstate the said trains 925 and 926, or to furnish to the said stations between Carbon Hill and the western line of the State a service equivalent to that previously afforded by the said trains 925 and 926.

Further answering said sixth paragraph, defendants say that under sections 9713 and 9714 of the Code of Alabama of 1923, complainant has for several years, since to-wit October 1, 1920, had opportunity at all times to have a legal hearing by said Commission to determine whether the service afforded by complainant to said stations named, between and inclusive of Sulligent and Carbon Hill, without service from trains Nos. 925 and 926, was adequate or not. Said

sections 9713 and 9714 of the Code of Alabama of 1923, fully quoted, are as follows:

"9713. Certificate of Convenience and Necessity.—No transportation company shall undertake the extension of its service or the constructiton of a new plant, property or facility (except ordinary extensions in the usual course of business), or shall acquire or operate any line, plant or property of another transportation company, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience [fol. 40] and necessity require or will require, or the public interest will be best served by such extension, construction, acquirement, operation, or acquirement and operation. No transportation company, subject to this article shall abandon all or any portion of its service to the public or the operation of any of its lines, properties or plant which would affect the service it is rendering the public, except ordinary discontinuances of service for nonpayment of charges, nonuses, violations of rules and regulations or similar reasons in the usual course of business, unless and until there shall first have been obtained from the Commission a permit allowing such abandonment. The commission, as it deems to the best interest of the public, may grant in part or in whole, or may refuse such application, and in the event such certificate of necessity is granted, the commission may impose such conditions as it deems expedient for the protection of the public interest. The commission must require the transportation company, when such application for a certificate of convenience is granted, to avail itself promptly of the authority or right granted, and in the event the transportation company fails to promptly avail itself of the rights granted, such certificate of convenience must be revoked. The provisions of this section shall not apply to transportation companies which are required under Title IV of the "Transportation Act" of Congress, approved February 28, 1920, to obtain from the interstate commerce commission a certificate of convenience and necessity."

"9714. Notice of Application; How Given—The application for and issuance of any such certificate provided for in the preceding section shall be under such rules and regulations as to hearing and other matters as the commission

may, from time to time, prescribe. Upon the receipt of any such application for such certificate, the commission shall cause notice thereof to be given the chief executive officers of the municipality or municipalities affected, and such notice shall be published once a week for three consecutive weeks in some newspaper of general circulation in each section affected."

Said sections 9713 and 9714 are parts of the Act of the Legislature, of Alabama, approved October 1, 1920 and known as the Alabama Transportation Act of 1920.

Defendants deny the allegation in paragraph six of the complaint that they have arbitrarily demanded that the complainant reinstate said trains 925 and 926 and have accompanied their demands for such reinstatement with threats to proceed in the courts of Alabama against complainant to collect the penalties provided by the statutes of Alabama. Defendants admit that said section 9713 of the Code of Alabama of 1923 as above set out is a part of the law of Alabama governing transportation companies, including the complainant, operating in the State of Alabama, and that section 9730 of said Code as set out in the original bill is likewise a part of such law of Alabama, and that section 9731 of the Code of Alabama of 1923 is as follows:

[fol. 41] "9731. Every Violation a Separate Offense; Act of Employee is Act of Company.—Every violation of the provisions of this article, or of any order, decision, rule, regulation, direction, or requirement of the commission, or any part or portion thereof, by any transportation company, is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense. In construing and enforcing the provisions of this article relating to penalties, the act, omission, or failure of any officer, agent, or employee of any transportation company acting within the scope of his official duties or employment shall in every case be deemed to be the act, omission or failure of such transportation company."

Defendants further admit that section 5350 of the Code of Alabama of 1923 provides in substance as alleged in the sixth paragraph of the original bill, and that section 5399 of said Code also provides in substance as alleged in the origi-

nal bill. And further answering paragraph six of the original bill, defendants say that on, to-wit, June 18, 1928, said Commission was informed that complainant proposed to discontinue operation of its said trains 925 and 926 between Carbon Hill, Alabama and Amory, Mississippi, thereby depriving all said towns of Sulligent, Crews, Beaverton, Guin, Winfield, Glen Allen, Bazemore, Eldridge and Clarke of the service rendered by said trains to said towns and the citizens thereof in intrastate commerce in Alabama. That said train 925 was an Eastbound train passing through said towns just named in the early part of the day, affording the citizens of said towns an opportunity to go into the cities of Birmingham and Jasper in the morning and transact their business and be able to return in the afternoon of the same day by said train No. 926, which, before its discontinuance left Birmingham at 4:30 p. m., and arrived at such stations between Sulligent and Carbon Hill at different times between 7:00 and 8:14 p. m. The said service in intrastate commerce rendered said towns in Alabama, as admitted by the bill of complaint, has been discontinued by the complainant without complainant's first having obtained a permit from the Commission allowing such abandonment. Complainant, as admitted by the bill, has never even filed a petition with the Commission seeking a permit allowing abandonment of such service.

When said Commission received information on June 18, 1928, that complainant proposed to discontinue said trains as aforesaid, the Commission instructed its Inspector, Mr. C. H. Ohme, to proceed to Birmingham, Alabama, and make [fol. 42] an investigation of said matter, and report his findings to said Alabama Public Service Commission; that on June 20th, 1928, said Inspector, C. H. Ohme, who was acting under instructions from said Commission, made the following report of his investigation to the said Alabama Public Service Commission:

"June 20, 1928.

Alabama Public Service Commission, Montgomery, Alabama.

GENTLEMEN: On an investigation I find that the St. Louis-San Francisco Railroad Company on the 18th day

of June, 1928, discontinued the operation of trains 925 and 926 from Carbon Hill, Alabama to Amory, Mississippi. Train 926 formerly operated between Birmingham, Alabama, and Amory, Mississippi, and since June 18th, 1928, this train only operates between Birmingham, Alabama, and Carbon Hill, Alabama. The time table of May, 1928, shows that this train leaves Birmingham at 4:30 p. m. Train 925 formerly operated between Amory, Mississippi, and Birmingham, Alabama, and since June, 1928, this train only operates between Carbon Hill, Alabama and Birmingham, Alabama. The time table of May, 1928, shows this train to arrive in Birmingham at 9:00 a. m. I understand that on June 13, 1928, Superintendent Butler issued the information and instruction to "all concerned" that on June 18, 1928, trains 925 and 926 would discontinue to operate between Amory, Mississippi, and Carbon Hill, Alabama. It is my understanding that this service was discontinued on June 18, 1928, without the authority of the Alabama Public Service Commission.

Yours very truly, Conrad H. Ohme, Chief Inspector, Alabama Public Service Commission.

Subscribed and sworn to before me, a Notary Public in and for the State and County above named, this the 20th day of June, 1928. My Commission Expires ——— —, ———. John C. Phillips. (Seal.)"

That upon receiving the above quoted report of its Inspector, the Alabama Public Service Commission addressed the following letter to the Attorney General of Alabama:

"Hon. Charlie C. McCall, Attorney General, State Capitol, Montgomery, Alabama.

Dear Sir: This Commission received a telegram on Monday morning, June 18th, from Hon. Marvin Pearce, of Winfield, Alabama, stating that the St. Louis-San Francisco Railroad Company, proposed to discontinue the operation [fol. 43] of its trains 925 and 926 between Carbon Hill, Alabama and Amory, Mississippi, and asking that no action be taken by this Commission prior to a hearing by the interested citizens. Later in the day Mr. Pearce and other citizens appeared before the Commission and stated that while no discontinuance of service had occurred up to that time,

that they wished to put the Commission on notice that the discontinuance above mentioned was imminent, in their opinion.

On Tuesday afternoon, June 19th, the Commission instructed its Inspector, Mr. C. H. Ohme, to proceed to Birmingham and investigate the aforesaid complaint. A copy of the Inspector's report, sworn to, is herewith submitted.

No application has been made by the St. Louis-San Francisco Railroad Company before this Commission for permission to discontinue the operation of these trains west of Carbon Hill, Alabama, and prior to this arbitrary discontinuance by the Railroad Company, they were serving several important Alabama communities with intrastate service.

The Commission and its staff, as well as the interested citizens, are in position to furnish your Department with ample evidence to prove that there has been a willful violation of an Alabama statute by the St. Louis-San Francisco Railroad Company.

Your attention is respectfully called to section 9713 of the Code of Alabama of 1923, as well as to other provisions of the Alabama law relating to the services of transportation companies.

The Commission will appreciate a prompt investigation by you of this matter and appropriate action upon the facts to enforce the law.

Yours truly, Hugh White, President. H. F. Lee, Associate Commissioner. Frank P. Morgan, Associate Commissioner."

That upon receipt of the above quoted letter by the Attorney General, it and the report of the Inspector was referred to J. Q. Smith, Assistant Attorney General of Alabama, who is especially assigned to duty with the Alabama Public Service Commission, for such action as he thought justifiable under the laws of Alabama.

That several days after having said letter and report turned over to him, the said J. Q. Smith, Assistant Attorney General, with Hon. W. R. C. Cocke, one of the attorneys for complainant, discussed the matter in said report and letter from the Alabama Public Service Commission, the said Smith expressing the opinion that he would probably bring

suit on behalf of the State of Alabama to recover the pen-
[fol. 44] alties provided by law from complainant, in the event it was determined that said complainant was violating the law by discontinuing the operation of trains 925 and 926 without permission of the Alabama Public Service Commission. That no suit or action at law was ever commenced to recover penalties against complainant, either before or after the filing of complainant's bill.

Seventh. Defendants deny each and every allegation contained in paragraph seven of the bill of complaint, and demand strict proof thereof.

Eighth. Defendants deny each and every allegation contained in paragraph eight of the bill of complaint, and demand strict proof thereof.

Ninth. Defendants deny each and every allegation contained in paragraph nine of the bill of complaint and demand strict proof thereof.

Tenth. Further answering the bill of complaint as a whole, the defendants say it is without equity.

Eleventh. Further answering the bill of complaint as a whole, the defendants say that the bill shows on its face that on and prior to June 18, 1928, complainant's said trains 925 and 926 were rendering service to the public in intrastate commerce within the State of Alabama, as admitted in the bill of complaint, and that, without obtaining a permit from said Alabama Public Service Commission to discontinue such service, being rendered as aforesaid to said towns of Sulligent, Crews, Beaverton, Guin, Winfield, Glen Allen, Bazemore, Eldridge and Clarke, and without even seeking such permit, complainant arbitrarily and defiantly discontinued said trains in violation of the law of Alabama, and that this bill of complaint, in sum and substance, is nothing more nor less than an effort by the complainant to have this Honorable Court enjoin the State of Alabama from the enforcement of its valid laws applicable to complainant's said conduct.

Twelfth. The defendants, further answering the original bill as a whole, say that complainant by the bill brings before this Honorable Court a matter that is legislative and
[fol. 45] administrative and not judicial in character,

namely: the determination of a rule or regulation to be applied in the future, that is to say, whether, under all the facts and circumstances involved therein, the complainant is entitled, under the laws of Alabama, to discontinue its said trains 925 and 926 from operation in the future in manner as stated in the bill. Defendants further say that the determination of such legislative and administrative matter insofar as intrastate service in Alabama is concerned, lies first with said Alabama Public Service Commission and that neither this Honorable Court nor any Court of the State of Alabama has original jurisdiction of such legislative and administrative matter. Defendants further say that if, upon proper petition by complainant in this behalf, addressed to said Commission, supported by facts which reasonably justify and require the granting of such permit, said Commission should arbitrarily deny the permit to complainant, then complainant has its adequate remedy under the law to review any such order of the Commission and/or enjoin the enforcement thereof until the reasonableness and validity of the order and/or the constitutionality and validity of the statutes upon which such order is predicated, have been passed upon by a proper judicial tribunal.

Thirteenth. Further answering said original bill as a whole, the defendants say that no order has been made by said Commission, directed to complainant touching the matters involved in the bill; that no action, civil or criminal, has been brought against complainant, predicated upon any of its said acts recited in the bill, and that complainant in this suit seeks to have this Court investigate and determine, originally, not a judicial matter, but a legislative and administrative matter, namely: whether complainant's discontinuance of said trains, as aforesaid, will be just and reasonable in the future; and defendants say that the jurisdiction of this Honorable Court is limited to judicial matters and that said Court is without jurisdiction, originally, to hear and determine such legislative or administrative matters.

[fol. 46] Fourteenth. Further answering the original bill as a whole, the defendants say that upon its face the bill shows that in the discontinuance of said intrastate service

heretofore rendered by said trains 925 and 926, the complainant, its servants and agents, have knowingly, willfully and defiantly violated the just, reasonable, valid and constitutional statutes of Alabama, and with their hands all soiled and stained with such inequitable and unlawful conduct, they have come into this Honorable Court asking it to shield complainant, its servants and agents from the just penalties prescribed by the law of Alabama for such unlawful conduct; further, that complainant, by this suit, seeks to enjoin the State of Alabama from the reasonable enforcement of its valid penal and criminal statutes.

Fifteenth. Further answering the original bill as a whole, the defendants attach as Exhibit 1 hereto and make the same a part of this answer, copy of time table No. 36 of complainant, duly certified by the Secretary of said Alabama Public Service Commission as being a true and correct time table of complainant's passenger trains operating between Amory, Mississippi and Birmingham, Alabama, on and prior to said date of June 18, 1928, when complainant discontinued operation of said trains 925 and 926 between Amory, Mississippi and Carbon Hill, Alabama.

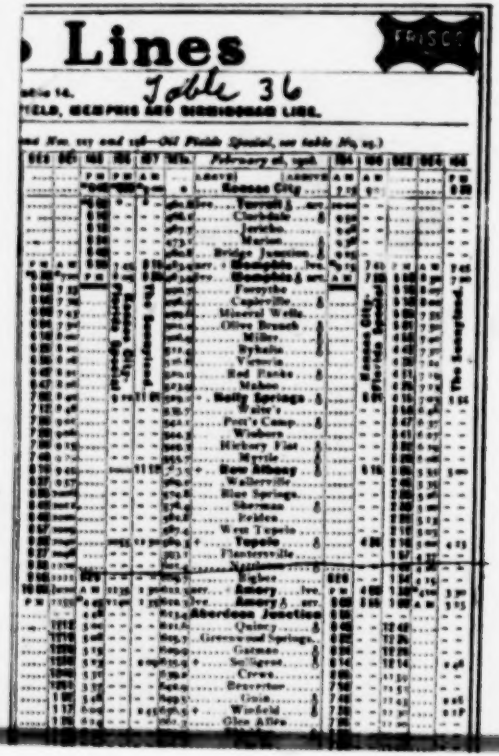
Defendants also attach as Exhibit 2 hereto and make the same a part of this answer, copy of time table No. 36 of complainant, duly certified by the Secretary of said Alabama Public Service Commisison as being a true and correct time table of complainant's passenger trains operating between Amory, Mississippi and Birmingham, Alabama after said date of June 18, 1928 and after complainant discontinued the operation of said trains 925 and 926 between Amory, Mississippi and Carbon Hill, Alabama, as aforesaid. Defendants ask that said Exhibits be taken as a part of their answer in this cause.

Wherefore, defendants pray that they be hence dismissed with their costs in this behalf expended.

Charlie C. McCall, Attorney General of Alabama;
J. Q. Smith, Assistant Attorney General of Alabama, Attorneys for Defendants.

(Here follow Exhibits Nos. 1 and 2 to Answer to Bill of Complaint, marked side folio pages 47 and 48)

EXHIBIT NO. 1. TO ANSWER TO BILL OF COMPLAINT.



Lines

FRISCO

Table 36

TEXAS, MEMPHIS AND SHREVEPORT LINES.



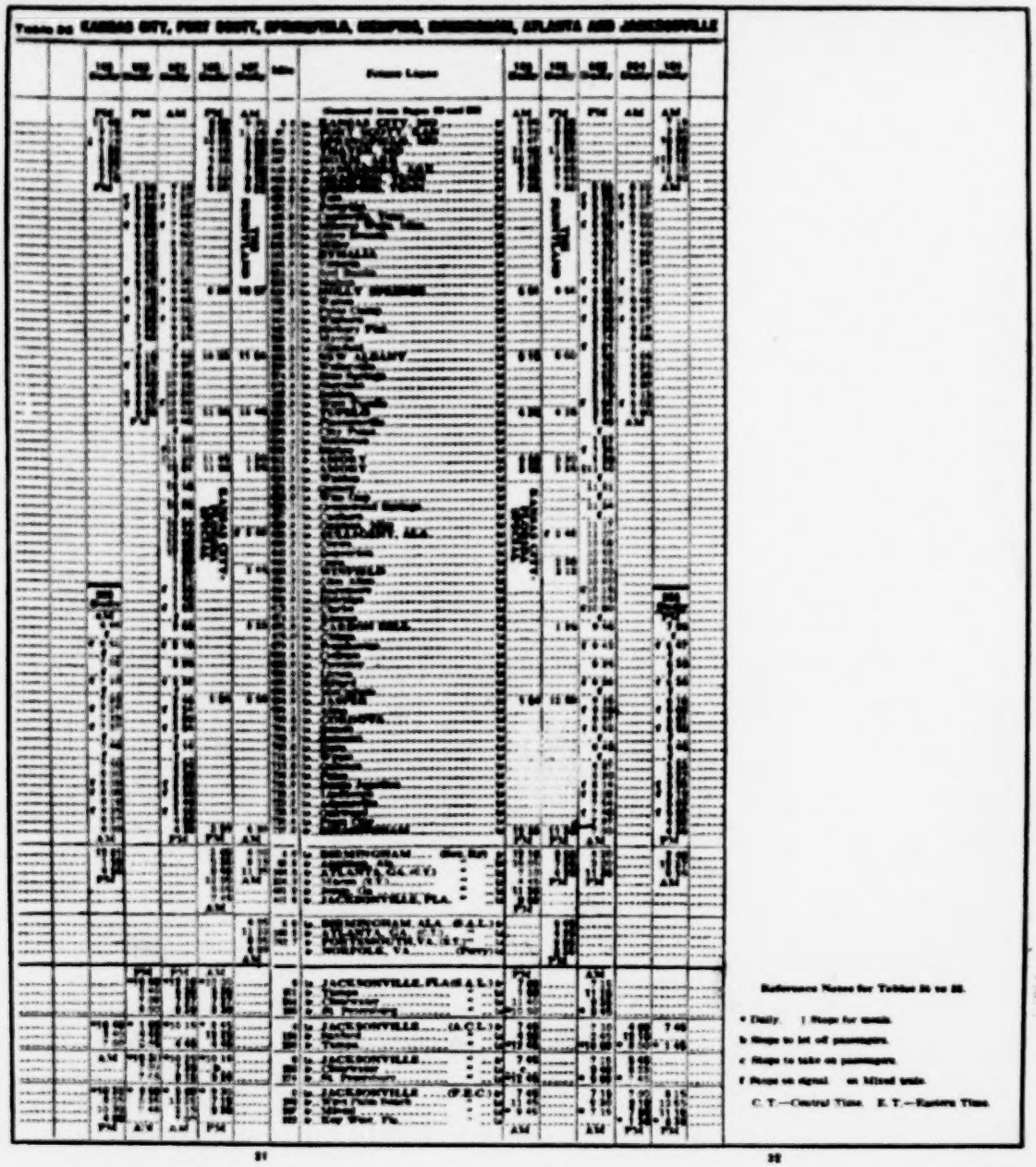
STATE OF ALABAMA,
COUNTY OF MONTGOMERY.

I, Lamar Wiley, Secretary of Alabama Public Service Commission, do hereby certify that the above and foregoing "Table 36" set out on this Exhibit 1 is a true and correct copy of time table 36 of St. Louis-San Francisco Railway Company, showing operation of said Company's passenger trains between Amory, Mississippi, and Birmingham, Alabama, on and prior to June 18, 1928, as such time table appears on file with said Commission.

Witness my hand as Secretary of said Commission, under seal of the Commission on this July 24, 1928.

Lamar Wiley,
Secretary. (SEAL)

EXHIBIT NO. 2. TO ANSWER TO BILL OF COMPLAINT.



STATE OF ALABAMA,
COUNTY OF MONTGOMERY.

I, Lamar Wiley, Secretary of Alabama Public Service Commission, do hereby certify that the above and foregoing "Table 36" set out on this Exhibit 2 is a true and correct copy of time table 36 of St. Louis-San Francisco Railway Company, showing operation of said Company's passenger trains between Amory, Mississippi, and Birmingham, Alabama after June 18, 1928, as such time table appears on file with said Commission.

Witness my hand as Secretary of said Commission, under seal of the Commission, on this July 24, 1928.

Lamar Wiley,

Secretary. (Seal)

[fol. 49] IN UNITED STATES DISTRICT COURT

In Equity. No. 414

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

ALABAMA PUBLIC SERVICE COMMISSION, HUGH WHITE, H. F. Lee, Frank P. Morgan, Charlie G. McCall, Attorney General of the State of Alabama, and J. Q. Smith, Special Assistant Attorney General of Alabama, Defendants

DECREE DENYING INTERLOCUTORY INJUNCTION—Filed Aug. 17, 1928

This cause coming on to be heard, is submitted upon the application of the plaintiff for interlocutory injunction, and upon the verified bill and supporting affidavits, and upon the denials of defendant's answer and supporting affidavits. And now upon consideration.

It is ordered, adjudged, and decreed that the interlocutory injunction prayed for be and the same is hereby refused and denied.

This August 17, 1928.

(Signed) Rufus E. Foster, U. S. Circuit Judge. H. D. Clayton, U. S. District Judge. Robert T. Ervin, U. S. District Judge.

[File endorsement omitted.]

[fol. 50] IN UNITED STATES DISTRICT COURT

[Title omitted]

Before Hon. Rufus E. Foster, U. S. Circuit Judge, and Hon. Henry D. Clayton and Hon. Robt. T. Ervin, U. S. District Judges

W. R. C. Cocke of Cabaniss, Johnston, Cocke & Cabaniss, Birmingham, Ala., attorney for plaintiff.

Hon. Charlie C. McCall, Attorney General of Alabama, and Hon. J. Q. Smith, Assistant Attorney General of Alabama, attorneys for defendants.

OPINION—Filed Aug. 17, 1928

CLAYTON, District Judge:

The plaintiff railway company is a common carrier of freight and passengers engaged in interstate and intrastate commerce. Its system of lines is within and through the states of Texas, Oklahoma, Arkansas, Kansas, Missouri, Tennessee, Mississippi, Alabama, and recently extended from Alabama to tidewater at Pensacola, Florida. Among the lines operated by the company is one between Birmingham, Ala., and Memphis, Tenn., and on it is the town of Amory in Mississippi, 125 miles from Birmingham. Besides its other stations on its line in Alabama, running from west to east, are the towns of Sulligent (101 miles from Birmingham), Crews Beaverton, Guin, Winfield, Glen Allen, Bazemore, Eldridge, Clark and Carbon Hill. The distance between Sulligent, the most westerly Alabama station, and Carbon Hill is thirty-nine miles and a fraction. Prior to June 18, 1928, the plaintiff for several years operated passenger trains between Birmingham, the eastern terminus of its lines in Alabama, and Amory, Mississippi, and other points west, four trains each day east- [fol. 51] bound, and a similar number each day westbound, that is, to and from Birmingham. The eastbound trains were numbered 105, 107, 921 and 925; the westbound trains, 106, 108, 922 and 926. The following was the schedule of the eastbound trains, 106, 108, 922 and 926. The following was the schedule of the eastbound trains between Sulligent and Carbon Hill:

Station	Train No. 105	Train No. 107	Train No. 921	Train No. 925
Sulligent	.....	2:40 A. M.	12:38 P. M.	5:23 A. M.
Crews	.....	.....	12:45 "	5:31 "
Beaverton	.....	.....	12:51 "	5:37 "
Guin	.....	.....	1:02 "	5:48 "
Winfield	.....	2:45 A. M.	1:17 "	6:05 "
Glen Allen	.....	.....	1:25 "	6:14 "
Bazemore	.....	.....	1:30 "	6:19 "
Eldridge	.....	.....	1:42 "	6:30 "
Clark	.....	.....	1:46 "	6:34 "
Carbon Hill	.....	3:23 A. M.	1:56 "	6:44 "

And the schedule of the westbound trains was as follows:

Station	Train No. 922	Train No. 926	Train No. 108	Train No. 106
Carbon Hill.....	10:55 A.M.	6:59 P.M.	1:35 A.M.	.....
Clark	11:00 "	7:04 "	.....	.....
Eldridge	11:05 "	7:09 "	.....	.....
Bazemore	11:15 "	7:20 "	.....	.....
Glen Allen	11:20 "	7:26 "	.....	.....
Winfield	11:30 "	7:38 "	2:12 A.M.	.....
Guin	11:43 "	7:48 "	2:28 "	.....
Beaverton	11:53 "	7:58 "	.....	.....
Crews	11:59 "	8:05 "	.....	.....
Sulligent	12:14 P.M.	8:14 "	2:48 A.M.	.....

On the plaintiff's line, the distance from Birmingham to Pratt City is about 7 miles, Oakwood 11, Adamsville 14, Lindbergh 19, Bessie Junction 20, Palos 21, Quinton 23, Wyatt 26, Dora 28, Samoset 30, Benoit 32, Cordova 34, Alma 38, Jasper 42, McCullum 45, Hillard 49, Liston 51, Townley 53, Cedrom 56, Pocahontas 58, Carbon Hill 61, Kansas 62½, Clarke 64½, Eldridge 67, Bazemore 73, Glen Allen 76, Winfield 80½, Guin 87½, Beaverton 94, Crews 93, Sulligent (Ala.) 101 miles, and Gatman (Miss.) 107 miles, Cauhorn 110, Greenwood Springs 111, Wise Gap 113, Quincy 115, Walden 119, Willcox 121, Aberdeen Junction 124, and Amory 125 miles. A simple mathematical calculation will show the distance from any small station to a larger station where the railroad company is still giving service notwithstanding the abandonment of trains 925 and 926.

On June 18, 1928 plaintiff discontinued the operation [fol. 52] of trains 925 and 926 between Carbon Hill, Alabama and Amory, Mississippi, without having made any application to or without having obtained the approval of the Alabama Public Service Commission, but continued their operation between Carbon Hill and Birmingham, so that the local service previously afforded by the two trains was eliminated only as to the Alabama stations of Sulligent, Crews, Beaverton, Guin, Winfield, Glen Allen, Bazemore, Eldridge and Clark, and covering a distance of between thirty-nine and forty miles.

Section 9713 of the Code of Alabama, 1923, provides that—

No transportation company • • • shall abandon all or any portion of its service to the public • • • unless

and until, there shall first have been obtained from the Commission a permit allowing such abandonment.

Section 9730 of the Code of Alabama is that—

Any transportation company which wilfully fails to comply with any of the provisions of this article or which abandons any service without first obtaining the consent of the Commission, * * * shall forfeit to the State of Alabama not over one thousand dollars for each offense, the amount to be fixed by the courts and to be recovered in a civil suit by the State instituted in the Circuit Court of Montgomery County, Alabama.

And Sec. 9731 of the Code states that—

Every violation of the provisions of this article, or of any order, decision, * * * or requirement of the Commission or any part or portion thereof by any transportation company, is a separate and distinct offense, and in case of a continuing violation each day's discontinuance thereof shall be a separate and distinct offense.

Furthermore, Sec. 5350 of the Code of Alabama in substance stipulates that every officer, agent or employee of any railroad corporation who shall violate or procure or aid any violation by such common carrier corporation, of any of the statutes of the State of Alabama relating to adequate service, or who shall fail to obey, observe or comply with any order of the Public Service Commission, relating to adequate service, shall be guilty of a misdemeanor, and on conviction shall be fined not exceeding one thousand dollars, to be fixed by the court; and Sec. 5399 of the said Code provides in substance that every officer, agent, etc. of any common carrier or corporation who shall violate or who aids or abets any violation of any order of the Public Service Commission, shall be guilty of a misdemeanor, and upon [fol. 53] conviction shall be fined a sum not exceeding five hundred dollars for each offense.

The plaintiff in its verified bill states several reasons why it should not be compelled to reinstate its trains 925 and 926, among these that the operation of such trains would entail great loss upon the plaintiff, and that if the Commission should order the continuance of such trains the excessive loss to the plaintiff would be in effect confisca-

tory. It is alleged that as a typical week for trains 925 and 926 between Amory, Miss., the terminus of those trains in Mississippi, and Carbon Hill, Ala., from April 15, to April 24, 1928 inclusive trains No. 925 earned a gross revenue of 15 cents per mile, and train No. 926 earned a gross revenue of 24 cents per mile, per day, and that the operating cost of each of these trains between such points equalled or exceeded $1.00 per mile per day, entailing an operating loss of about 85 cents per mile per day. However, the defendants offered affidavits tending to contradict such claim made by the plaintiff.

The plaintiff avers that the ticket sales for the stations named during the month of May, 1928, divided between intrastate and interstate sales, were—Sulligent, state $97.00, interstate $441.36; Crews, state $3.54, interstate, nothing; Beaverton, state $2.15, interstate $5.85; Guin, state $296.71, interstate $151.51; Winfield, state $428.07, interstate $289.76; Glen Allen, state $11.26, interstate, nothing; Bazemore, state $16.07, interstate $10.55; Eldridge, state $38.05, interstate $5.80; but that the figures given for Winfield and Sulligent, both intra-state and inter-state, include also ticket sales for train 921, 922, 107 and 108.

The Federal census of 1920 gives the population of the villages, to-wit: Sulligent, 1071, Crews 163, and Beaverton 165, in Lamar County, with an estimated population of 20,000; Bazemore 100, and Glen Allen 109, in Fayette County, 20,000; Winfield 753, and Guin 596, in Marion County, 25,000; Clark, none, Eldridge 125, and Carbon Hill 3000, in Walker County, 60,000. Plaintiff also alleges, and produced affidavits tending to support the same, that those stations which according to its schedule do not have the service of two trains each way a day, the would-be passenger patrons of the railroad have easy access to the larger stations of Winfield, Carbon Hill and Guin, where [fol. 54] additional trains stop each way.

We do not agree with the plaintiff's contention set up in the bill and urged in the oral argument, that it cannot test the constitutionality of any or all of the Alabama statutes except in the Federal Court. The Alabama law provides for the review of any action of the Commission in the State Court. Moreover, if there be a Federal question in the case and the plaintiff should consider itself aggrieved by the decision of the Alabama Supreme Court thereon, the question

of course could be submitted to the Supreme Court of the United States for final determination. It goes also without saying that no unconstitutional penal statute can deprive a defendant of the right to review and test validity in any criminal proceeding which may be instituted. Doubtless this proposition is so elementary that amplification or further comment is unnecessary.

Under the allegations of the bill and the denials of the answer, and the affidavits tending to support each such pleadings, the question is raised, whether or not the Commission's continuance of the two trains would constitute any material interference with interstate commerce. In the present state of the controversy, the Court is not sufficiently informed by the facts now before it, which seem to be in dispute, as to which contention is correct. Courts do not have the facilities for obtaining and presenting all the facts and circumstances relating to such a dispute. Such facilities are possessed by the plaintiff and by the defendant Commission. The Court is entitled to the further help of each, so that all the facts pertaining to the case may be fully adduced and presented. Whether or not the continuation of the two trains shall be declared confiscatory, two factors enter into the equation—service and convenience to a substantial part of the traveling public, justifying reasonable expense of operation, or great loss entailed upon the plaintiff wholly disproportionate to the public benefit. The Commission has not officially investigated the question or reached any conclusion thereon; therefore, we think the Court should not at this time interfere with the orderly processes of the Alabama statutes and the lawful actions of the state agents or agencies. Compare W. & A. v. Public Comm., 267 U. S., 493.

[fol. 55] The plaintiff insists also that trains 925 and 926 were operated in interstate commerce, and that, therefore, the matter of their discontinuance or their continuance was not within the jurisdiction or control of the Alabama Public Service Commission. And, further, if the plaintiff be required to first obtain the consent of the Commission before discontinuing trains 925 and 926 west of Carbon Hill, that it would be subject to enormous fines and penalties, and its officers and agents to prosecution in the event of the plaintiff's refusal to reinstate trains 925 and 926 into service west of Carbon Hill; that such penalties would be in hostil-

ity to due process and equal protection of the law provided by the Fourteenth Amendment to the Constitution of the United States; and that Sections 9713 and 9730 of the Code of Alabama seek to impose an unreasonable burden upon and regulation of interstate commerce, in violation of the Commerce Clause of the Constitution of the United States, Art. I, S. 8, P. 3. Again compare W. & A. v. Public Comm., supra.

It seems to us that if the Commission is without authority over the matter of the discontinuance of the two trains simply because they have been operated out of Alabama and into Mississippi 24 miles, to Amory, then it would be easy for any railroad company to discontinue any of its intra-state trains without the approval of the Alabama Public Service Commission by simply extending the operation of such trains a few miles into an adjoining state. Such would not be a use but would be an abuse of the Commerce Clause; and, we think that the conduct of the railroad company here cannot be justified because in proper cases protection is afforded to interstate commerce.

As the cause is now presented, it appears that the action of the plaintiff in discontinuing the service without a petition to the Public Service Commission cannot be approved; it is based upon apprehension, not well founded, rather than upon justifying actuality—wrong done to plaintiff or even imminently threatened unlawful injury. But under the circumstances of this case the conduct of the plaintiff need not be characterized as "arbitrary and defiant", for we think that in discontinuing the two trains without ap- [fol. 56] proval of the Public Service Commission was no more than an honest mistake based upon the plaintiff's plausible but unsound reasoning.

Upon the hearing it was made manifest to the Court that the Alabama authorities would take action against the plaintiff and its agents—indeed it may be that they are in duty bound so to do—under the provisions of the statutes hereinbefore recited; and for that reason the plaintiff now asks for interlocutory injunction.

It is not to be assumed that the Commission, clothed with administrative authority and with quasi-legislative and judicial power, will exceed law and justice by exacting of the plaintiff a public service not reasonably balanced by a fair return, if such balancing of the public good with the

expense entailed upon the plaintiff is practicable and of benefit to a considerable number of people and not unduly onerous upon the plaintiff, taking into consideration all the facts and circumstances of and incident to the matter. The pertinent observation of current history may be here indulged, that the Public Service Commission has recently in several cases, in some material particulars at least analogous to this case, permitted railroad companies to discontinue the service of certain local trains where they were operating at a material loss because facts and circumstances had arisen, such as the loss of passenger patronage where the public has largely resorted to travel by motor busses and automobiles, induced by relative happenings such as improved roads largely encouraging vehicular traffic. The plaintiff has not submitted a case of obvious interference with interstate commerce, or one which, as it now stands, justifies a preliminary injunction; and we hold that the plaintiff should have made its application to the Alabama Public Service Commission for the discontinuance of the two trains.

It is to be remembered that the Congress could not hear, fairly consider and adjust the intricate matters of passenger and freight rates, so the Interstate Commerce Commission was created and vested with ample regulatory and administrative powers over passenger and freight traffic between the states. Of course the law of Congress in that field is paramount, and harmonizes with the purpose of the Commerce Clause. So, likewise, when it was apparent that [fol. 57] the state legislatures could not adequately deal with intrastate problems arising under attempts to regulate the passenger and freight rates within the states, and cognate things such as the discontinuance of trains, compelling the erection of suitable passenger station buildings, etc. the states created public service commissions with appropriate authority under the police power reserved to them. The usefulness of such public service commissions is not to be unduly hampered or even interfered with except where lawful power is exceeded or sound discretion is abused by unreasonable and unjust rulings and orders. Mindful of the wisdom of such enactments, the Federal courts have sedulously recognized the benefits of such commissions; and the proper rules and orders of such commissions—the Interstate Commerce Commission and the state

commissions as well—have been upheld. The courts have not interposed except where the law has been transcended or power and discretion abused. It would be a waste of space to collate the numerous cases upholding, and those disapproving the acts of such commissions.

If the observations just made be banal, let the reader turn to the article "Public Service Commissions" in July 1928 Am. Bar Assn. Journal, p. 359, by Hon. Wm. D. Guthrie, where his learned and illuminating discussion lifts the subject out of the hackneyed class. Of course one need not agree with all that is said in the able critique.

Now, going on, the Alabama law requiring the regulating body of the state to be advised of a proposed change seriously affecting transportation conditions, and here to some small extent affecting interstate commerce, is well within the police power of the state, and is to be exercised for the benefit of the traveling public, with due regard to the rights of the plaintiff to be free from serious loss, in its nature confiscatory, by the operation of any public service.

However, the development of the law by adjudications and the attitude of the courts in regard to controversies like the one before us is aptly shown in cases lately decided by the Supreme Court of the United States. From Lawrence v. St. L.-S. F. Ry., 274 U. S., 588, these apposite words are taken:

[fol. 58] We have no occasion to determine whether the Oklahoma Act is obnoxious to the Federal Constitution. But as bearing upon the propriety of issuing the temporary injunction, the fact is important that the controversy concerns the respective powers of the nation and of the state over railroads engaged in interstate commerce. Such railroads are subject to regulation by both the state and the United States. The delimitation of the respective powers of the two governments requires often nice adjustments. The Federal power is paramount. But public interest demands that, whenever possible, conflict between the two authorities and irritation be avoided. To this end it is important that the Federal power be not exerted unnecessarily, hastily, or harshly. It is important also that the demands of comity and courtesy, as well as of the law be deferred to.

The language quoted evidences the animating spirit of the Federal courts. Compare Henderson W. Co. v. Corp. Comm., 269 U. S. 278, where the Court, p. 280, Mr. Chief Justice Taft speaking, said:

The District Court puts refusal to grant the injunction in the present case on the ground that the complainant had not sufficiently exhausted his remedies before the Corporation Commission. We think the District Court was entirely right in this.

Plaintiff alleges that the passenger train service now furnished to the railroad stations hereinbefore mentioned is reasonably adequate; but, as has been indicated, we are not so convinced, in view of the Defendants' denial of that proposition. But it seems to be probable, under all the facts and circumstances of the case, that such assertion by the plaintiff may be true. However, there ought to be a ruling by the Commission after full and fair investigation, which should lead to a just ascertainment.

Of course the cause will remain before this Court until the proper time comes for further action—in its present status it cannot be finally disposed of. Whatever course the plaintiff may pursue or the defendants take, the case must await for such further action or determination as developments may render requisite.

Accordingly, appropriate order is entered and interlocutory injunction is denied.

We concur. (Signed) Rufus E. Foster, U. S. Circuit Judge. Robert T. Ervin, U. S. District Judge.

[File endorsement omitted.]

[fol. 59] In United States District Court

[Title omitted]

Assignment of Errors—Filed Oct. 6, 1928

Now comes complainant (appellant) in the above entitled cause and files the following assignment of errors on which it will rely upon its prosecution of the appeal from the or-

der and decree in this cause on the 17th day of August, 1928, by the Court consisting of the Honorable Rufus E. Foster, U. S. Circuit Judge, Honorable Henry D. Clayton and Honorable Robert Ervin, U. S. District Judges, denying and refusing the interlocutory injunction prayed for in the bill of complaint.

1. The Court erred in denying to complainant herein the interlocutory injunction prayed for in the bill of complaint.

2. The Court erred in failing and refusing to grant to complainant against the defendants, appellees herein, the interlocutory injunction prayed for in the bill of complaint.

3. The Court erred in holding in and by its said orders and decree denying the prayer of the bill of complaint for an interlocutory injunction and by its written opinion handed down with said order and decree that the Alabama Public Service Commission has or had authority or jurisdiction over complainant's trains number 925 and 926 or that complainant was under any legal duty or obligation to apply to said Alabama Public Service Commission for an order discontinuing the operation of said trains.

4. The Court erred in holding in and by its order and decree denying the prayer of the bill of complaint for an interlocutory injunction and by its written opinion handed down with said order and decree that complainant's trains numbers 925 and 926, which were trains operated in intrastate commerce, were in any manner subject to the authority or jurisdiction of the Alabama Public Service Commission.

[fol. 60] 5. The Court erred in holding in and by its order and decree denying the prayer of the bill of complaint for an interlocutory injunction and by its written opinion handed down with said order and decree that Sections 9713 and 9730 of the Code of Alabama (1923) requiring complainant to obtain consent of the Alabama Public Service Commission to the discontinuance of trains numbers 925 and 926 was not an unreasonable interference with, burden upon and regulation of, interstate commerce in violation of paragraph 3 of Sec. 8 of Art. I of the Constitution of the United States.

6. The Court erred in holding, in and by its order and decree denying the prayer of the bill of complaint for an interlocutory injunction and by its written opinion handed down with said order and decree that sections 9713 and 9730 of the Code of Alabama (1923) requiring complainant to obtain consent of the Alabama Public Service Commission to the discontinuance of trains numbers 925 and 926 and providing heavy penalties for discontinuance without such consent, (though complainant claimed in good faith that said trains were not subject to the jurisdiction of said Commission because operated in interstate commerce, and though the Alabama statutes provide no method whereby complainant could, in advance, question the jurisdiction of said Commission without incurring penalties), do not deprive complainant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

7. The Court erred in holding by said order and decree and opinion that the several provisions of the statutes of Alabama required complainant to obtain the consent of the Alabama Public Service Commission to the discontinuance of trains numbers 925 and 926 or incur the penalties and prosecutions provided by Sections 9730, 9731, 5350 and 5399 of the Code of Alabama (1923), and in holding that said statutes do not deprive complainant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States in that said statutes penalize complainants failure to obtain such consent without affording complainant any method to test in advance the assertion by said Commission of jurisdiction (denied by complainant) over trains operated in interstate commerce.

8. The Court erred in holding by said order and decree [fols. 61-68] and opinion that the operation and enforcement by defendants against complainant of Sections 9713, 9730, 9731, 5350 and 5399 of the Code of Alabama (1923) under the circumstances described in the bill of complaint and admitted by the answer and proven by complainants affidavits, would not constitute an unreasonable interference with, burden upon and regulation of interstate commerce in violation of paragraph 3 of Sec. 8 of Art. I of the Constitution of the United States.

9. The Court erred in holding by said order and decree and opinion that the operation of Sections 9713, 9730, 9731, 5350 and 5399, if enforced by defendants against complainant under the circumstances described in the bill of complaint would not deprive complainant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Wherefore appellant prays that said order and decree be reversed.

Cabiness, Johnson, Cocke & Cabiness, W. R. C. Cocke, Solicitors for complainant (Appellant).

Presented and ordered filed this 22nd day of August, 1928.

H. D. Clayton, U. S. District Judge.

[File endorsement omitted.]

[fol. 69] In United States District Court

[Title omitted]

Petition for Appeal—Filed Oct. 6, 1928

To the Honorable Henry D. Clayton, U. S. District Judge:

The above named St. Louis-San Francisco Railway Company, feeling aggrieved by the decree entered in the above entitled cause on the 17th day of August, 1928, refusing and denying the interlocutory injunction prayed for by this complainant in its bill of complaint, does hereby appeal from said order and decree to the Supreme Court of the United States for the reasons set forth in the assignment of errors set forth herewith, and it prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and docketings upon which said order and decree was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of such court in such cases made and provided.

And petitioner further prays that a proper order relating to the required security for costs of the appeal be made.

Cabaniss, Johnson, Cocke & Cabaniss, W. R. C. Cocke, Attorneys for Complainant.

[File endorsement omitted.]

[fol. 70] In United States District Court

No. 414. In Equity

St. Louis-San Francisco Railway Company, a corporation, Complainant,

vs.

Alabama Public Service Commission, Hugh White, H. F. Lee, Frank P. Morgan, Charlie C. McCall, Attorney General of the State of Alabama, and J. Q. Smith, Special Assistant Attorney General of Alabama, Defendants

Order Allowing Appeal—Filed Oct. 6, 1928

This 6 day of October, 1928, came the complainant by its attorneys, and filed herein and presented to the Court its petition praying for the allowance of an appeal to the Supreme Court of the United States from the order and decree in this cause entered on the 17th day of August, 1928, together with the assignments of error intended to be urged by it, praying also that a transcript of the record, proceedings, and the papers upon said order and decree was entered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow said appeal upon the defendant giving bond according to law, in the sum of one thousand dollars ($1,000.00).

(Signed) H. D. Clayton, U. S. District Judge.

[File endorsement omitted.]

[fol. 71-73] Bond on Appeal for $1,000.00, approved and filed October 6, 1928, omitted in printing.

[fol. 74] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND STIPULATION AS TO FACTS OF RECORD TO BE PRINTED—Filed Dec. 11, 1928.

Now comes appellant and in compliance with the requirements of paragraph 9 of Rule 13 of this court, files the following statement of the points on which appellant intends to rely on this appeal, and of the parts of the record necessary for the consideration thereof:

(1) That the District Court of the United States for the Northern Division of the Middle District of Alabama erred in denying to appellant herein the interlocutory injunction prayed for in the bill of complaint.

(2) Said District Court erred in holding in and by its order and decree denying the prayer of appellant's bill of complaint for an interlocutory injunction, and by its written opinion handed down with said order and decree, that the Alabama Public Service Commission had authority or jurisdiction over appellant's trains numbers 925 and 926, or that appellant was under any legal duty to apply to said Alabama Public Service Commission for permission or for an order to discontinue the operation of said trains.

(3) Said District Court erred in holding in and by its order and decree denying the prayer of appellant's bill of complaint for an interlocutory injunction, and by its written opinion handed down with said order and decree, that appellant's trains numbers 925 and 926, which were trains operated in interstate commerce, were in any manner subject to the authority or jurisdiction of the Alabama Public Service Commission.

(4) Said District Court erred in holding in and by its said order and decree and by its written opinion, that Sec-
[fol. 75] tions 9713 and 9739 or either of said sections, of the Code of Alabama (1923) requiring appellant to obtain the consent of the Alabama Public Service Commission for the discontinuance of its trains 925 and 926 was not an unreasonable interference with, burden upon, or regulation of interstate commerce in violation of paragraph 3 of Sec-

tion 8, of Article I of the Constitution of the United States, the said sections of said Alabama code being as follows:

"Section 9713. Certificate of Convenience and Necessity. —No transportation company shall undertake the extension of its service or the construction of a new plant, property or facility (except ordinary extensions in the usual course or business), or shall acquire or operate any line, plant or property of another transportation company, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require, or the public interest will be best served by, such extension, construction, acquirement, operation, or acquirement and operation. No transportation company subject to this article shall abandon all or any portion of its service to the public or the operation of any of its lines, properties or plant which would affect the service it is rendering the public, except ordinary discontinuance of service for nonpayment of charges, nonuses, violations of rules and regulations or similar reasons in the usual course of business, unless and until there shall first have been obtained from the commission a permit allowing such abandonment. The commission, as it deems to the best interest of the public, may grant in part or in whole, or may refuse such application, and in the event such certificate of necessity is granted, the commission may impose such conditions as it deems expedient for the protection of the public interest. The commission must require the transportation company, when such application for a certificate of convenience is granted, to avail itself promptly of the authority or right granted, and in the event the transportation company fails to promptly avail itself of the rights granted, such certificate of convenience must be revoked. The provisions of this section shall not apply to transportation companies which are required under Title IV of the 'Transportation Act' of congress, approved February 28, 1920, to obtain from the interstate commerce commission a certificate of convenience and necessity."

"Section 9730. Failure of Transportation Company to Comply with Provisions of Article; Penalty.—Any transportation company which wilfully fails to comply with any

provisions of this article or which abandons any service without first obtaining the consent of this commission, or wilfully fails to obey, observe or comply with any lawful order, decision, rule, regulation, direction, or requirement or any part thereof, of the commission, shall forfeit to the State of Alabama not over one thousand dollars for each offense, the amount to be fixed by the court, and to be recovered in a civil suit by the state, instituted in the circuit court of Montgomery County, Alabama."

(5) Said District Court erred in holding by its said order and decree and by its said written opinion, that said Sections 9713 and 9730 of the Code of Alabama (1923) requiring appellant to obtain the consent of the Alabama Public Service Commission to the discontinuance of its [fol. 76] said trains 925 and 926, and providing heavy penalties for their discontinuance without such consent (through appellant claimed in good faith that said trains were not subject to the jurisdiction of said Commission because operated in interstate commerce, and though the Alabama statutes provide no method whereby appellant could in advance question the jurisdiction of said commission without incurring the said penalties) did not deprive appellant of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

(6) Said District Court erred in holding in and by its said order and decree and opinion, that the several provisions of the statutes of Alabama required appellant to obtain the consent of the Alabama Public Service Commission for the discontinuance of its trains 925 and 926, or in default of such consent to incur the penalties and prosecutions provided by sections 9730, 9731, 5350 and 5399 of the Code of Alabama (1923), and in holding that said statutes did not deprive appellant of its property without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States in that said statutes penalize appellant's failure to obtain such consent without affording any method to test in advance the validity of the assertion by said Public Service Commission of jurisdiction (denied by appellant) over trains operated in interstate

commerce, said sections 5350 and 5399 of the Code of Alabama being as follows:

"Section 5350. Violations of Statutes as to Reasonable Rates, Adequate Service, and Unjust Discriminations; Penalty.—Every officer, agent, or employe of such common carrier or railroad corporation who shall violate or procure, aid or abet any violation by such common carrier, or railroad corporation, of any of the statutes of this state relating to reasonable rates, adequate service, and unjust discriminations of the public service of any common carrier of this state, or who shall fail to obey, observe, or comply with any order of said commission, or who procures, aids or abets any such common carrier, or corporation, in its failure to obey, observe, and comply with any such order, direction, or provision relating to reasonable rates, adequate service and unjust discrimination by common carriers of this state, shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined not exceeding one thousand dollars, to be fixed by the court."

"Section 5399. Violating Orders of Public Service Commission; Penalty for.—Every officer, agent or employe of any common carrier or corporation, who shall violate, or who procures, aids or abets any violation of, or who shall fail to obey, observe of comply with any order of the public service commission, or any provisions of any order of the commission, or who procures, aids or abets any such common carrier or corporation in its failure to obey, observe and comply with any such order or provision, shall be guilty of a misdemeanor, and upon conviction shall be fined a sum not exceeding five hundred dollars for each offense to be fixed by the court or judge trying the case."

(7) Said District Court erred in holding by its said order and decree and opinion that the enforcement against appellant by appellees, of Sections 9713, 9730, 5350 and 5399 of the Code of Alabama (1923) under the circum- [fols. 77 & 78] stances shown in the bill of complaint and admitted by the answer and proven by the affidavits of appellant filed in the cause would not constitute an unreasonable interference with, burden upon, and regulation of interstate commerce in violation of paragraph 3 of Section 8, of Article I of the Constitution of the United States.

(8) Said District Court erred in holding in and by its said order and decree and opinion that the enforcement by the appellees of Sections 9713, 9730, 5350 and 5399 of the Code of Alabama (1923) under the circumstances described in the bill of complaint would not deprive appellant of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

The parts of the record necessary for the consideration of the foregoing points are as follows:

(1) The bill of complaint and the amendment thereto.

(2) The answer of the defendants (appellees).

(3) The affidavits of John C. Starkey, A. P. Matthews and H. W. Press.

(4) The opinion of Clayton, District Judge, rendered August 17, 1928.

(5) The decree denying the application for an interlocutory injunction.

(6) The assignments of error filed by appellant on this appeal.

(7) The petition for appeal.

(8) The order allowing the appeal.

(9) Bond on appeal.

W. R. C. Cocke, Attorney for Appellant.

Acceptance of Service and Stipulation

The undersigned attorney of record for the appellees herein, hereby acknowledges service of the foregoing statement and receipt of a copy thereof, and does agree that the hearing of the appeal herein shall be had upon the portions of the record designated by appellant.

Charlie C. McCall, Attorney General; J. Q. Smith, Asst. Atty. Gen., Attorneys for Appellees.

[fol. 79] [File endorsement omitted.]

Endorsed on cover: File No. 33877. M. Alabama D. C. U. S. Term No. 568. St. Louis-San Francisco Railway Company, Appellant, vs. Alabama Public Service Commission, Hugh White, H. F. Lee, et al. Filed December 5th, 1928. File No. 33877.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1928

No. 568

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, *Appellant,*

vs.

ALABAMA PUBLIC SERVICE COMMISSION, HUGH WHITE, H. F. LEE, ET ALS, *Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA

STATEMENT OF APPELLANT DISCLOSING BASIS OF JURISDICTION

This is an appeal from a decree denying an application before three Federal judges for an interlocutory injunction made in a suit in equity brought by appellant under Section 266 of the Federal Judicial Code, in the District Court of the United States for the Middle District of Alabama, seeking to enjoin the Alabama Public Service Commission consisting

of the defendants (appellees) Hugh White, H. F. Lee, and Frank P. Morgan, and of the defendants (appellees) Charlie C. McCall, Attorney General of Alabama, and J. Q. Smith, Assistant Attorney General of Alabama, from attempting to enforce against appellant penalties under the statutes of Alabama claimed to have been incurred by appellant by reason of its discontinuance without the consent of the Alabama Public Service Commission, of two interstate passenger trains numbered 925 and 926, one eastbound and one westbound, that previously ran between Birmingham, Alabama and Amory, Mississippi and stopped at the intermediate stations in Alabama, of Sulligent, Crews, Beaverton, Guin, Winfield, Glen Allen, Bazemore, Eldridge, Clark and Carbon Hill.

(a) The bill praying for the interlocutory injunction alleged,

(1) That the trains having been operated in interstate commerce, were not subject to the jurisdiction of the Alabama Commission, and that the Alabama statutes cited hereafter construed by the Commission as requiring appellant to obtain the Commission's consent to the discontinuance of the trains and of the local service afforded thereby, and penalizing a failure to obtain such consent, operated as an unlawful burden upon, regulation of, and interference with interstate commerce, in violation of paragraph 3 of Section 8, of Article I of the Constitution of the United States.

(2) That the attempt of the state officers to enforce the penalties against appellant under the pro-

visions of the Code of Alabama would be violative of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The statutory provision believed to sustain the jurisdiction is Section 266 of the Federal Judicial Code, (June 18, 1910, c. 309, Sec. 17, 36 Stat. 557; Mar. 3, 1911, c. 231, Sec. 266, 36 Stat. 1162; Mar. 4, 1913, c. 160, 37 Stat. 1013; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938).

(b) The date of the decree denying the interlocutory injunction was August 17, 1928. (Record, p. 31). The application for appeal was presented and allowed on October 6, 1928. (Record, p. 43, 44).

(c) The bill of complaint filed by appellant (Record, p. 1 to 16) alleged that prior to June 18, 1928, appellant had operated two passenger trains, one eastbound and one westbound, numbered 925 and 926, between Birmingham, in the State of Alabama, and Amory, in the State of Mississippi; that these interstate trains had afforded local service to the Alabama stations of Sulligent, Crews, Beaverton, Guin, Winfield, Glen Allen, Bazemore, Eldridge, Clark and Carbon Hill, but that on June 18, 1928, appellant, considering that because of the interstate character of the trains the Alabama Public Service Commission had no jurisdiction over them, had discontinued these trains between Carbon Hill, Alabama and Amory, Mississippi, without securing or applying for the consent of the Commission, and that as a consequence the two trains no longer afforded passenger service to the said Alabama stations.

That the Alabama Commission, asserting that the action of the appellant in discontinuing the two trains was a violation of the Alabama laws, had threatened to enforce by suits in the Alabama courts the penalties against the appellant under the following sections of the Alabama Code (1923) numbered 9713, 9730, 5350 and 5399:

> "Section 9713. Certificate of Convenience and Necessity.—No transportation company shall undertake the extension of its service or the construction of a new plant, property or facility (except ordinary extensions in the usual course of business), or shall acquire or operate any line, plant or property of another transportation company, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require, or the public interest will be best served by, such extension, construction, acquirement, operation, or acquirement and operation. No transportation company subject to this article shall abandon all or any portion of its service to the public or the operation of any of its lines, properties or plant which would affect the service it is rendering the public, except ordinary discontinuance of service for non-payment of charges, non-uses, violation of rules and regulations or similar reasons in the usual course of business, unless and until there shall first have been obtained from the commission a permit allowing such abandonment. The commission, as it deems to the best interest of the public, may grant in part or in whole, or may refuse such application, and in the event such cer-

tificate of necessity is granted, the commission may impose such conditions as it deems expedient for the protection of the public interest. The commission must require the transportation company, when such application for a certificate of convenience is granted, to avail itself promptly of the authority or right granted, and in the event the transportation company fails to promptly avail itself of the rights granted, such certificate of convenience must be revoked. The provisions of this section shall not apply to transportation companies which are required under Title *IV* of the 'Transportation Act' of congress, approved February 28, 1920, to obtain from the interstate commerce commission a certificate of convenience and necessity."

"Section 9730.—Failure of Transportation Company to Comply with provisions of this Article; Penalty.—Any transportation company which wilfully fails to comply with any of the provisions of this article or which abandons any service without first obtaining the consent of the Commission, or wilfully fails to obey, observe or comply with any lawful order, decision, rule, regulation, direction or requirement, or any part or provision thereof, of the Commission, shall forfeit to the State of Alabama not over one thousand dollars for each offense, the amount to be fixed by the courts and to be recovered in a civil suit by the State instituted in the Circuit Court of Montgomery County, Alabama."

"Section 5350.—Violations of Statutes as to Reasonable Rates, Adequate Service, and Unjust Discriminations; Penalty.—Every officer, agent or employe of such common carrier or railroad corporation who shall violate or procure, aid or

abet any violation by such common carrier, or railroad corporation, of any of the statutes of this state relating to reasonable rates, adequate service, and unjust discriminations of the public service of any common carrier of this state, or who shall fail to obey, observe, or comply with any order of said commission, or who procures, aids or abets any such common carrier, or corporation, in its failure to obey, observe, and comply with any such order, direction, or provision relating to reasonable rates, adequate service and unjust discrimination by common carriers of this state, shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined not exceeding one thousand dollars, to be fixed by the court."

"Section 5399.—Violating Orders of Public Service Commission; Penalty for.—Every officer, agent or employe of any common carrier or corporation, who shall violate, or who procures, aids or abets any violation of, or who shall fail to obey, observe or comply with any order of the public service commission, or any provisions of any order of the commission, or who procures, aids or abets any such common carrier or corporation in its failure to obey, observe and comply with such order or provision, shall be guilty of a misdemeanor, and upon conviction shall be fined a sum not exceeding five hundred dollars for each offense to be fixed by the court or judge trying the case."

The bill alleged that the threatened attempt on the part of the defendants to enforce the penalties would be violative of the Federal Constitution because:

(1) The trains having been operated in interstate commerce were not within the jurisdiction of the State

Commission, but that the Commission was asserting that it had jurisdiction and had demanded that appellant reinstate said trains or subject itself to the penalties; that defendants were threatening to, and would unless enjoined, proceed against appellant in the courts of Alabama, to recover in one or more suits or actions the enormous and cumulative penalties provided by the Alabama statutes, and that so long as appellant failed to reinstate the service it would be open to separate actions to recover separate and cumulative penalties during each day that the failure might continue, and appellant's officers and agents would be subject to criminal prosecutions. That such an attempt to enforce the penalties would be an unreasonable interference with, burden upon, and regulation of interstate commerce, in violation of paragraph 3 of Section 8 of Article *I* of the Constitution of the United States.

(2) That the laws of the State of Alabama furnish no method or procedure by which appellant could in advance test the legality of the demand of defendants that it reinstate the trains; that the Commission had never issued any citation to or formal order against complainant requiring it to appear, or any order with reference to the operation of the trains, and therefore no action had been taken by the Commission that would lay any predicate or form any basis for appellate review by the Alabama courts.

That appellant was confronted with the necessity either of reinstating the trains or subjecting itself to the cumulative penalties, and that therefore the sec-

tions in question penalized the discontinuance of the service afforded by the trains, without appellant having been accorded an opportunity or method under the Alabama laws to first contest the question of the jurisdiction of the Commission or the legality of the statute in the courts as imposing a burden upon or regulation of interstate commerce, and that the consequent effect of the statutes was to require appellant to elect at its peril between recognizing the jurisdiction of the Alabama Commission in a case where it was the assertion of the appellant that no such jurisdiction existed, or accepting the alternative of being subjected to the penalties and criminal prosecutions referred to.

That, accordingly, the sections as so construed by the defendants were void as an attempt to deprive appellant of its property without due process of law, in violation of the Fouteenth Amendment to the Constitution of the United States.

The bill prayed for an interlocutory injunction restraining defendants from enforcing, or attempting to enforce, the penalties against the appellant. There was a hearing before a three judge court which, on August 17, 1928, entered a decree (Record, p. 31) denying the application for an interlocutory injunction and delivered an opinion (Record, pp. 31-40) holding that appellant should have applied to the Alabama Commission before discontinuing the trains and in effect decided that the defendants could enforce the penalties against appellant.

(d) The cases believed by appellant to sustain the jurisdiction of the lower court to grant the interlocu-

tory injunction and the jurisdiction of this court to review the decree denying the injunction are:

Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 67 L. Ed. 659;
Prendergast v. New Telephone Co., 262 U. S. 43, 67 L. Ed. 853;
Commonwealth of Mass. v. Mellon, 262 U. S. 447, 67 L. Ed. 1078;
C. B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. Ed. 979;
Reagan v. Farmers Loan & Trust Co., 154 U. S. 362, 38 L. Ed. 1014;
Prentis v. Atl. Coast Line R. Co., 211 U. S. 210, 53 L. Ed. 150.
Home Telephone & Telegraph Co. v. Los Angeles, 227 U. S. 278, 57 L. Ed. 510.

W. R. C. Cocke,
Attorney for Appellant.

Service of a copy of the foregoing statement has been made upon Charlie C. McCall, Esq., Attorney General of Alabama, and J. Q. Smith, Esq., Assistant Attorney General of Alabama, attorneys for the appellees, prior to the filing hereof.

W. R. C. Cocke,
Attorney for Appellant.

OPINION

SUPREME COURT OF THE UNITED STATES.

No. 568.—October Term, 1928.

St. Louis-San Francisco Ry. Co., Appellant, vs. Alabama Public Service Commission, et al.	Appeal from the District Court of the United States for the Middle District of Alabama.

[May 20, 1929.]

Mr. Justice Brandeis delivered the opinion of the Court.

Section 9713 of the Code of Alabama (1923) prohibits a railroad from abandoning "any portion of its service to the public . . . unless and until, there shall first have been obtained from the [Public Service] Commission a permit allowing such abandonment." Very severe penalties, including punishment of officers, agents and employees, are prescribed in case the abandonment is willful. §§ 9730, 9731, 5350, 5399. Without obtaining such permission or applying therefor, the St. Louis-San Francisco Railway discontinued two interstate trains by means of which it had long furnished intrastate service between several cities and towns in Alabama. Then it brought, in the federal court for the Middle District of that State, this suit against the Commission, the Attorney General and other officials, to enjoin the commencement of proceedings to enforce the penalties prescribed. An application for an interlocutory injunction, heard before three judges under § 266, was denied, 27 Fed. (2d) 893. A restraining order, issued upon the filing of the bill, was continued in force pending the determination of this appeal.

The bill alleges that the operation of the interstate trains by which the intrastate service had long been furnished had involved the carrier in losses; that the service still furnished by other trains is adequate to supply the reasonable needs of the communities; that, upon learning of the discontinuance of the service, the Commission demanded that it be restored, without first hearing the carrier; that if § 9713 is construed as requiring the carrier to

obtain the Commission's permission before discontinuing intrastate service rendered by means of an interstate train, or as prohibiting such discontinuance although an unreasonable burden is thereby imposed upon the carrier, the statute violates the commerce clause of the Federal Constitution; that if construed as requiring, without a prior hearing, reinstatement of the service so discontinued, it violates also the due process clause; and that the matter in controversy exceeds the jurisdictional amount. The prayers are for an injunction against enforcing any penalty for discontinuance of the service or for failure to reinstate the same; and for a declaration that the statute, if construed as stated, is void under the federal Constitution. The answer denies many of the allegations of the bill.

The Railway contends that it had no way of testing the constitutionality of the statute, otherwise than by this suit. It urges that if it had applied to the Commission for permission to discontinue the service, it would have thereby recognized its jurisdiction; and that since the Commission did not before directing reinstatement of the service issue any order to the carrier to appear, there was no action by the Commission which could form the basis for a review in courts of the State. We have no occasion to consider the issues of fact or to determine whether the Alabama statute if construed as suggested is obnoxious to the Federal Constitution. Upon facts admitted it is clear that the carrier should not have discontinued the intrastate service without first applying to the Commission for permission. No constitutional right could have been prejudiced by so doing. No emergency existed requiring immediate action. And no serious financial loss would have been incurred by the slight delay involved. *Western & Atlantic R. R.* v. *Georgia Public Service Commission*, 267 U. S. 493, 496; *Lawrence* v. *St. Louis-San Francisco Ry. Co.*, 274 U. S. 588, 595.

The past failure of the Railway to apply for leave to discontinue the service does not, however, justify exposing it, and its officers and employes, to the severe penalties prescribed by the statute. It may be that, upon full presentation of the facts, the Commission would find that to continue the service would subject the carrier to an unreasonable burden; or the carrier may suggest some satisfactory substitute for the specific service now de-

manded of it. The Commission should give to the Railway the opportunity of presenting the facts; and if an application is made promptly, the matter should be determined by the Commission without subjecting the Railway to any prejudice because of its failure to ask leave before discontinuing the service. Compare *Lawrence* v. *St. Louis-San Francisco Ry. Co.*, 278 U. S. 228. To this end the decree will be vacated; and the restraining order will be continued. Compare *Ohio Oil Co.* v. *Conway*, 279 U. S. —. If after such hearing the Commission insists that the service objected to be restored, further proceedings appropriate to the situation may be had in the cause in the District Court.

Decree vacated.

A true copy.

Test:

Clerk, Supreme Court, U. S.